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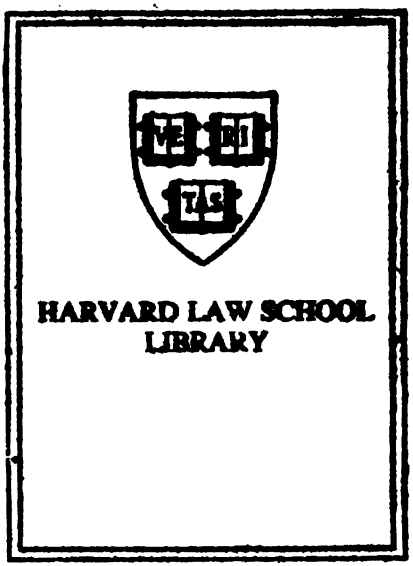

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28

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA.

VOL. 46—FOR THE YEAR 1894.

PART I.

HENRY DENIS, REPORTER.

NEW ORLEANS:
F. F. HANSELL & BRO., PUBLISHERS.
1895.

Rec. May 1, 1896.

JUDGES OF THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

CHIEF JUSTICE:

FRANCIS T. NICHOLLS.

ASSOCIATES:

LYNN B. WATKINS.

SAMUEL D. McENERY.

JOSEPH A. BREAUX.

* CHARLES PARLANGE.

† HENRY C. MILLER.

* Resigned in January, 1894.

† Appointed in February, 1894.

JUSTICE CHARLES E. FENNER, a former Associate Justice of the Court, resigned in September, 1893; this reference was accidentally omitted from the 45th Volume of the Annual Reports of this State; the JUSTICE had taken part in the decisions of more than two-thirds of the opinions reported in that volume.

ATTORNEY GENERAL:

M. J. CUNNINGHAM.

CLERKS OF THE COURT:

THOMAS McC. HYMAN, AT NEW ORLEANS.

ROBERT J. WILLSON, AT MONROE.

B. F. MAGINLEY, AT OPELOUSAS.

H. H. HARGROVE, AT SHREVEPORT.

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	123		1,382		826	3,092	1,111
148	122	1,469	1,378	1,895	826	3,093	934
	123	1,481	310	1,926	903	3,098	1,111
160	124		599	1,927	713	3,133	1,046
	976		600		903		1,053
	982		613		40		1,046
161	984	1,489	614	1,934	375	3,152	1,053
	985		616		713		1,062
	986		617		902	3,157	1,062
	989		622	1,935	713		1,003
217	352		599	1,945	886		1,004
228	521		600	1,946	866		1,042
339	1,471		606	1,955	866		1,046
415	76		607	1,956	1,377	3,162	1,053
432	239	1,492	608	1,994	99		1,062
446	1,123		610	2,045	489		1,066
	1,124		611	2,046	489		1,067
455	1,570		612	2,125	901		1,068
457	1,570		613	2,127	902		1,071
497	652		622	2,158	1,044	3,182	1,053
503	882	1,504	918	2,160	1,532	3,183	1,053
	883		1,376	2,162	1,502		1,054
509	677	1,533	1,378	2,185	382	3,185	1,053
666	85		1,382	2,239	906	3,191	377
871	246	1,536	755	2,240	906	3,197	1,356
977	637	1,541	755	2 242	906	3,227	382
986	640	1,551	1,377	2,269	1,092	3,252	377
1,000	637		1,381	2,270	1,092	3,254	377
1,010	638	1,559	819	2,274	759	3,256	377
1,014	633		1,425	2,279	1,092	3,258	379
1,017	633	1,578	1,426	2,286	1,098	3,262	379
	639		1,427	2,290	633	3,263	377
1,021	637		601	2,291	633	3,290	293
1,022	640	1,588	604		634	3,292	1,164
1,024	640		605		375	3,293	1,164
1,031	637	1,606	311	2,315	1,373	3,386	905
	641	1,612	311		1,548	3,409	1,030
1,035	635	1,658	1,134	2,316	1,373	3,433	668
1,036	633	1,659	128	2,383	1,206	3,451	883
1,037	633	1,660	128	2,384	1,206	3,457	667
	637		129	2,385	1,206	3,487	668
	638	1,668	128	2,386	1,206	3,538	1,208
1,038	633		129	2,390	344	3,543	1,258
1,048	1,311	1,669	129	2,398	343	3,544	1,208
1,071	637	1,672	129	2,420	1,213		
1,164	336	1,673	1,134	2,425	1,223		

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8	1,134	791	1,248	1,010	829	1,803	1,179
351	358		1,249		1,276	1,810	1,113
354	359		1,250	1,021	1,440	1,817	1,355
683	1,122	792	1,441	1,032	550	1,942	96
684	239	809	1,248	1,042	809		97
756	809	904	1,520	1,172	1,440	3,321	359
785	705	905	15	1,796	389	3,493	1,412
	706		18	1,799	369	3,522	1,412
	1,462		1,520		238	3,523	1,412
	1,464		1,521	1,802	369		
790	1,250	932	1,365		1,179		
	1,271	992	301		1,429		

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172	1833	533	134	1880	933	85	1888	564
30	1841	1,256	136	1880	1,204	87	1888	1,033
120	1842	258	187	1880	153			1,036
17	1852	1,329	7	1882	1,233	104	1888	678
307	1855	124	11	1882	1,462	115	1888	1,129
		984			151	116	1888	35
3	1856	1,239			831	134	1888	934
20	1866	162			835			1,272
157	1868	1,342	20	1882	836	135	1888	528
		1,344			846			558
118	1869	1,033			910			943
14	1870	811			1,116	25	1890	944
80	1870	811	43	1882	298			949
47	1873	1,478	75	1882	10			960
		1,480			16	41	1890	151
		1,481	76	1882	16			1,293
		8	96	1882	17			1,294
		9			408	79	1890	1,298
3	1874	11	65	1884	809			1,302
		12	71	1884	1,848			1,564
		13	82	1884	153			1,567
95	1876	1,440			10			408
38	1877	1,240	107	1884	17			543
		1,244			408			545
		738	112	1884	1,565			873
		1,195	35	1886	1,277	106	1890	875
44	1877	1,275	44	1886	358			1,150
		1,410			1,302			1,151
		1,411	96	1886	10			1,153
		8	98	1886	17			1,154
58	1877	9	101	1886	451			451
		11			452			452
77 E. S.	1877	9			931			927
96	1877	152	114	1886	1,116	150	1890	930
		154			1,117			931
35	1880	1,442	7	1888	1,208			1,444
54	1880	738	55	1888	563			1,484
75	1880	1,473			564	46	1892	1,564
77	1880	16	80	1888	153	88	1892	682
		410			155	106	1892	684
110	1880	451			10			686
114	1880	1,210	85	1888	11	89	1894	1,410
		1,211			17			1,411

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT NEW ORLEANS,

IN

JANUARY, 1894.

JUDGES OF THE COURT:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. LYNN B. WATKINS,
HON. SAMUEL D. McENERY,
HON. JOSEPH A. BREAUX,
*HON. CHARLES PARLANGE.
} *Associate Justices.*

*Appointed on the 4th day of October, 1893.

No. 11,285.

A. CLASON & CO. VS. THE CITY OF NEW ORLEANS.

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Moneys standing to the credit of a non-resident firm on the books of a New Orleans bank are not taxable. The relations between a bank and its customers are those of creditor and debtor. The moneys are not specially deposited to be identically restored. They go into the mass of the bank's money with the understanding that they might be used and should be the basis of items of a debit and credit account. Such a debt is not distinguishable from those due to the foreign firm from any other cause.

APPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

H. Heidenhain for Plaintiff and Appellee.

E. A. O'Sullivan, City Attorney, and *Henry Renshaw*, Assistant City Attorney, for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiffs allege themselves to be a firm domiciled in the city of Manchester, England, and doing business in the city of New Orleans. They aver that on October 14, 1892, through their representative in that city, Ernest Overbeck, they were served with a notice of threatened seizure (which they annexed to their petition) by the treasurer of New Orleans, calling upon them for the payment of a city tax of 1892 amounting to $400, besides interest and costs, based upon an alleged assessment on the sum of $20,000 on money at interest and cash.

They allege that during the year 1892 they had no money at interest or cash in the city of New Orleans, and therefore said assessment is absolutely null and void.

That in pursuance of said notice the said treasurer had placed a keeper at their office, and claimed to have seized other property of theirs not assessed, all of which proceedings are null and void, arbitrary and unwarranted.

That if they owe any tax to the city of New Orleans, which is denied, then the proceedings of the treasurer are premature, because they have until the 1st of November to bring a direct action to cancel or reduce said assessment.

That they have taken all necessary legal steps to have said assessment canceled without success.

That they fear that, unless restrained, the treasurer would persist in his efforts to collect said illegal tax by the seizure and sale of property of theirs not liable therefor, and otherwise harass them to their great detriment and injury.

They prayed for an injunction restraining the city of New Orleans from attempting to collect the said tax by the seizure and sale of their property—for citation upon the city and for a judgment in their favor perpetuating the injunction and annulling the assessment.

The injunction asked for was granted.

The notice referred to in the petition is as follows:

"NEW ORLEANS, October 14, 1892.

"*To A. Clason & Co., No. 45 Union Street:*

"By authority of the laws of the State of Louisiana and ordinances of the city of New Orleans demand is hereby made on you for the

payment of city taxes for the year 1892, as per assessment for said year on money at interest, cash, etc. Amount of assessment, $20,000.

Amount of tax at 2.02	$404 00
10 per cent. interest from June 23, 1892	12 58
Advertising	10
Notices	10
Keepers at $1.50 per day, 1 day (10-14)	1 50
Total	$418 28

"In default whereof your property will be seized and sold, according to law.

(Signed) "CHARLES H. SCHENCK,

"*Treasurer of the City of New Orleans.*"

The city, reserving the benefit of any and all exceptions to which it might be entitled, filed an answer denying all and singular the allegations of plaintiffs' petition, and excepting that the State tax collector had not been made a party to the suit. It prayed that it be dismissed, with judgment in its favor.

No action seems to have been taken upon this exception. On trial of the case judgment was rendered in favor of the plaintiff and against the city of New Orleans, perpetuating the injunction issued and restraining the city from attempting to collect the tax claimed by it. Defendant has appealed.

During the trial a copy from the assessment rolls of the assessment against A. Clason & Co. was filed. It is as follows:

"Sq. No. 228, Union, Gravier, Carondelet and Baronne streets; Arthur Clason & Co., cotton buyers.

"Money loaned on interest, all credits and all bills receivable for money loaned, and all credits of any and every description, $10,000.

"Money in possession, on deposit or in hand, $10,000."

Only one issue is presented to us for consideration, that of the liability of the plaintiffs to taxation on moneys standing to their credit in bank.

The plaintiff is a commercial firm having its domicil in Manchester, England. It has an office in New Orleans at which its sign is displayed, and it pays a license for the privilege of carrying on its business. Its business in this State is confined to making, through a clerk or agent stationed here, purchases of cotton for shipment to the house in Europe. Its operations are extensive, requiring an outlay varying from $900,000 to $1,200,000 *per annum* for its cotton

purchases, which average about 30,000 bales a year. The agent of the firm, in his testimony, says that the money used to buy and pay for the cotton is raised through exchange. "When he gets an order to purchase he pays for it when shipped—he draws on the house in Manchester and gets the money from the bank. He delivers a bill of lading, and against that bill he draws a bill of exchange, which he deposits in bank and draws a check to pay for the cotton. He sells the exchange to the bank (sometimes to parties other than the bank), which gives him a check for the exchange. This he deposits in bank and the firm is given a credit for the amount against which he checks." In answer to questions propounded to him, he said that "occasionally, on rare occasions, he drew clear drafts; that for such purposes there was an open credit which would cover the drafts. He would give the bank the draft; there was no discount; he would sell the draft and deposit the proceeds to credit in bank."

The question submitted to us is whether these amounts standing in bank to the credit of the plaintiffs are subject to taxation.

In Insurance Co. vs. Board of Assessors, 44 An. 762, we held that the fact that foreign corporations did business in this State through a local board of directors made up of residents of New Orleans did not localize the company itself to a greater extent than if the business were conducted by an agency not organized into a board, and that whether represented by a board of their selection or by agents, they remain foreign companies, and in so far as relates to residence the same rule applies.

We also held that debts due to a non-resident of a State are not liable to be taxed by a State in which he did not reside. That his credits are not within the State's jurisdiction. These views were reaffirmed in the case of Railey vs. the Board of Assessors, 44 An. 765.

In the first case mentioned, referring to the second item on the assessment, which figured as "money in possession," we said the evidence showed that the company was correctly assessed; that it was property within the State and subject to taxation; that it was visible and tangible, and expressly made taxable by statute, and is taxable where situated; that the authorities which maintained that debts could not be assessed against non-residents had established the rule that non-residents owning tangible and movable property within the State might be taxed. This ruling was based upon an admission by

the plaintiff company that it had an amount of $10,000 money in cash in the city of New Orleans (44 An. 762).

Under the principles enunciated in those cases the fact that the plaintiff has a resident clerk acting for it in the city of New Orleans, and that it has an office, and pays a license there, is unimportant. For the purpose of a determination of the issue involved herein we have to deal with the the plaintiffs as *non-residents*, and *in so dealing with them* we are of the opinion that the judgment of the lower court is correct. We can not distinguish between the debt due to the plaintiffs by a bank as arising from a deposit to the credit of the firm in money and that due to it from any other cause.

The relations between the plaintiff and defendant are those of creditor and debtor. The moneys were not specially deposited and to be identically restored. They went into the mass of the bank's money with the understanding that they might be used and should be the basis of items in a debit and credit account. Sims vs. Bean, 10 An. 347; Mathews, Finley & Co. vs. Their Creditors, 10 An. 344.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

No. 11,410.

STATE OF LOUISIANA VS. SIMON JOHNSON.

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The finding by the jury of the guilt of an accused must be direct and positive.

The court is not justified to "reason" to an inferred verdict of guilty. A verdict consisting of the simple word "manslaughter" written on the indictment, not prefixed by the words "guilty of," is fatally defective, and it is not cured by a polling of the jury when "Is 'manslaughter' your verdict?" was the only question asked of its members.

APPEAL from the Eighteenth District Court, Parish of Terrebonne. *Caillouet, J.*

M. J. Cunningham, Attorney-General, and *B. F. Winchester*, District Attorney, for the State, Appellant.

L. F. Suthon for Defendant and Appellee.

The opinion of the court was delivered by

NICHOLLS, C. J. The accused was indicted for the murder of one Rose Bolden. The case was taken up for trial and evidence heard, and in the minutes of November 20, 1893, we find the following entry: "After mature consultation and deliberation the jury returned into open court in presence of the accused, Simon Johnson, and then and there were called by the clerk of the court, when each juror answered to his name, and on being further asked by said officer if they had agreed upon a verdict they answered in the affirmative, and through Edgar J. Richard, their foreman, selected among themselves, presented to the court the following verdict:

"'Manslaughter. (Signed) E. J. RICHARD, *Foreman.*'

"The said verdict was then read to the jury. On being asked by the clerk of the court whether such was their verdict the said jury answered that it was, whereupon on motion of counsel for accused the court ordered that the jury be polled, when each juror on being asked by the clerk of the court if 'manslaughter' was his verdict answered in the affirmative. Whereupon the court ordered said verdict recorded, the accused remanded and the jury discharged in this case—all in presence of the accused."

The accused moved in arrest of judgment on the ground that "the verdict of the jury rendered in the cause is meaningless and fatally defective, and is as much a verdict of acquittal as of conviction."

The district judge sustained this motion and ordered the accused to be remanded to await further proceedings under the indictment. The State has appealed.

The defendant in his brief contends that "in legal contemplation a verdict is a judgment—it must decide something—it must declare the guilt or the innocence of the accused; it must pass upon the issue presented. The simple word 'manslaughter' surely decides nothing—it is the name of a crime only. The court can supply nothing to make a judgment out of this verdict—the jury alone could do that and it has passed away."

We are of the opinion that the verdict is fatally imperfect and defective—it does not pass upon the guilt or innocence of the accused, and however clear we may be as to the idea which the jury intended to convey, we can not reach a judgment in a criminal case purely by intendment, as we would have here to do.

In some States and for some offences the jury not only determines the guilt or innocence of the accused, but assesses the punishment,

and in such cases it has been held that the verdict must find the defendant guilty, then add the punishment—that the latter without the former would be inadequate.

These decisions must obviously rest upon the principle that the court is not authorized or justified to "reason" to an inferred verdict of guilty against the accused (see Bishop on Criminal Procedure, Third Edition, Sec. 1012 and notes thereunder).

The finding of the jury of the guilt of the prisoner must be direct and positive.

The State claims that "the polling of the jury had the effect of curing the imperfections of the verdict," and State vs. Smith, 33 An. 1416, and State vs. Ross, 32 An. 855, are relied upon in support of this contention, but an examination of the manner in which in this case the jury was polled, will show that the situation was not varied or altered for the better by that fact.

For the reasons herein assigned it is hereby ordered, adjudged and decreed, that the judgment appealed from be and the same is hereby affirmed.

No. 11,357.

STATE EX REL. BOARD OF LIQUIDATION VS. JOHN PICKETT, STATE TREASURER.

1. Act 8 of 1874; Act 58 of 1877, regular session, and Act 77 of 1877, extra session, were not repealed by the adoption of the Constitution of 1879, and the Debt Ordinance thereto appended.
2. The constitutional amendment of 1874 embodies the purport and substance of the legislative enactment of that year, and declares that the tax required for the payment of the principal and interest of the bonds shall be assessed and collected every year, until the bonds shall be paid, principal and interest; and the debt ordinance declares that there shall be levied an annual tax sufficient for the full payment of the interest on the bonds.
3. There is no essential difference in the phraseology of the two constitutional enactments.
4. The legislative enactments of 1877 provide that any surplus that may remain after the payment of interest coupons shall be deposited with the fiscal agent at credit of a specific and distinct fund, to be called and known as the Redemption of the Public Debt Fund, and shall be used exclusively, under directions of the board of liquidation, for the retirement and sinking of the consolidated bonds and past due coupons.
5. The act of 1877, extra session, makes it the duty of the treasurer to keep separate accounts of the income and expenditures of each year; and, after setting apart or paying out an amount thereof equal to the appropriations and warrants lawfully made against each of said funds, the surplus, if any remain, shall be immediately deposited by the treasurer at the credit of the Redemption of the Public Debt Fund.

3. The debt ordinance deals exclusively with the *interest* and not the *principal* of the bonds, leaving the latter in *statu quo;* and the fact that the bondholders were given an *option* to surrender their holdings and recover other bonds in exchange, on the terms proposed therein, did not impair their force or validity.
7. All statutes enacted since the adoption of the debt ordinance of 1879 must be construed in conformity therewith.
In point of fact all subsequent statutes deal with an existing fund—an interest tax surplus—already collected under existing laws, and, at most, same could only lead to the supposition that the laws of 1874 and 1877 were not operative; and had it been intended by the Legislature to repeal any of said laws, same would have been nugatory and void.

APPEAL from the Civil District Court, Parish of Orleans. *Ellis, J.*

M. J. Cunningham, Attorney General, for the Relator and Appellee.

Respondent *in propria persona.*

The opinion of the court was delivered by

WATKINS, J. The Board of Liquidation represents that from the funds set aside from year to year—that is to say, from 1880 to 1882—to pay the interest on the consolidated bonds of the State, there has accumulated a surplus in said interest fund exceeding *$400,000*. That, under the provisions of Act 3 of 1874 and Act 58 of 1877, it is the duty of the Board of Liquidation to have such surplus invested in bonds and coupons attached, by purchasing same at public auction from the lowest bidder, after due advertisement, and under the conditions and with the restrictions imposed by law.

The further averment of the board is that said surplus interest fund has been segregated from the funds and revenues of the State, and dedicated and consecrated to the bonded debt, and duly and legally appropriated to be employed by said board for the purpose of buying bonds and coupons, as aforesaid.

That said board has passed a resolution directing advertisements for bids, as it was its plain duty to do.

That, under the act of 1877, and other laws of the State, it is the plain ministerial duty of the State treasurer to pay for all bonds so redeemed and retired or bought under the direction of the board on the order of the board; but that, notwithstanding his said duty, said

treasurer has refused to pay and declared that he will not pay for said bonds, upon the order of the board or on the warrant of the auditor; and said board believes it would be a vain and useless thing to advertise for bids in the face of such declaration and refusal, and hence a mandamus is necessary to compel the performance of duty on the part of the treasurer.

The prayer of the board is that the treasurer be ordered to pay for any bonds that may be bought under its direction, as provided by law, or show cause to the contrary.

The following is the return of the treasurer—or at least the substance of same, as exhibited by printed extracts we have selected from his brief, to-wit:

"Now comes respondent, and for answer and cause why the mandamus herein sued out should not be made peremptory, and why he should not pay for bonds as demanded, shows as follows:

"That an investment of the kind proposed could not legally be made by the Board of Liquidation, and the necessary funds therefor disbursed by respondent for the following reasons:

"That while the Constitution of 1879 does not curtail or abolish the duties of the Board of Liquidation, so far as they relate to the issuance of consolidated bonds, it has revoked and withdrawn from the auditor and treasurer all of the powers conferred by Act No. 8 of 1874. That continuing appropriations for interest and redemption of bonds made by the act of 1874, and supplementary acts of 1877 (Act No. 58, regular session, and Act No. 77, extra session), were inconsistent with Art. 43 of the new Constitution, which prohibits money from being taken out of the State treasury except in pursuance of a specific appropriation, and the Legislature from making an appropriation for a greater length of time than two years."

* * * * * * * *

He refers to State ex rel. E. Gross vs. Auditor, 35 An. 537, and St. Cyr vs. Auditor, unreported, as adjudications of this court sanctioning his view. Also Hart vs. Burke, 33 An. 458, to the same purport.

He also cites Elliott vs. Jumel, 107 U. S. 711, for the purpose of demonstrating the correctness of his view to the effect that the State had, through the instrumentality of the Debt Ordinance of 1879, withdrawn from its officers the powers conferred by the constitutional amendment of 1874.

The extract from that opinion which is relied upon is the following, viz.:

The Supreme Court of the United States said: "It is equally manifest that the *object* of the State in adopting the debt ordinance of 1879 was to stop the further levy of the promised tax, and to prevent the disbursing officers from using the revenue from previous levies to pay interest falling due in January, 1880, as well as the principal and interest maturing thereafter," and "that the Constitution of 1879, on its face, takes away the power of the executive officers to comply with the act of 1874 can not be denied. As against everything but the outstanding bonds and coupons, this Constitution is the fundamental law of the State, and it is only invalid so far as it impairs the obligation of the contract on the faith of which the bonds and coupons were taken by their respective holders."

The respondent then summarizes the legislation of the State since the adoption of the Constitution and Debt Ordinance of 1879, for the purpose of showing contemporaneous legislative construction of their provisions favorable to his theory, as follows:

"The new Constitution limits taxation to six (6) mills and makes no provision for a sinking fund, and the Legislature has failed to do so, either by an appropriation or reservation of surplus or other money.

"That in Act No. 75 of 1882, and Section 89 of Act No. 85 of 1888, transferring all surplus interest money to the general fund, we have legislative constructions of the Debt Ordinance. The Legislature has declared all funds continuing funds, and made it the duty of the Treasurer to transfer surplus interest money to the general fund of the same year without waiting for legislative action.

"That Act No. 75 of 1882 transferred the surplus interest fund for the years 1880, 1881, 1882, 1883 and 1884, collected or collectible and appropriated to pay the interest on the consolidated and constitutional bonds of the State, to the general funds of said years.

"That Act No. 107 of 1884, in Section 5, page 139, provides that the surplus of the interest tax shall be applied to the general fund tax, and in Section 12 repeals all laws or parts of laws in conflict with said act.

"That Act No. 96 of 1886, Section 98, page 161, applies all surplus in excess of $480,000 to the general fund, and by Section 95 repealed all laws or parts of laws in conflict with said act.

"That Act No. 85 of 1888, in the first paragraph of Section 89, applied to the general fund all the surplus of the interest tax fund, and in the same section makes it the duty of the State Treasurer, without legislative action, to make transfers of any and all balances after providing for the payment of all warrants drawn against the several funds, to the credit of the same funds for the succeeding years, except as otherwise provided for, and by Section 92 repeals 'all those parts of laws on the subject of levy, assessment and collection of State taxes heretofore enacted which are in conflict with the Constition of the State, or are inconsistent with, or superseded by, or in conflict with the provisions of said act.'

"That the Acts No. 3 of 1874 and No. 58 of 1877 have been repealed by the Acts of 1882, 1884, 1886 and 1888, above quoted.

"That all surplus to the credit of any and all funds being under the provisions of said Acts of 1882, 1884, 1886 and 1888, transferred to the credit of the same funds for the ensuing years, except the surplus to the credit of the interest fund, which is specially transferred to the credit of the general fund, the same can now only be withdrawn from the treasury in pursuance of specific legislative appropriation.

* * * * * * * * *

"Respondent further shows that the construction of Article 43 of the Constitution, which would prevent the proposed investment, is the same that has been adopted by the Treasurer since 1880, under the advice of the Attorney Generals, as will appear from the following extracts from opinions on file in this office: 'The prohibition in Article 43 of the Constitution against drawing money from the treasury except in pursuance of a specific appropriation made by law, applies to and covers all money in the treasury, whether deposited or paid in before or after the adoption of the Constitution of 1879. It is also an elementary and fundamental principle of free government, and even in the absence of a specific constitutional prohibition, money could not be drawn out of the treasury, directly or indirectly, without legislative authority."

The treasurer then concludes his return as follows, viz.:

"That by no act of theirs, has the Legislature, or State officers or members of the Board of Liquidation, recognized the acts of 1874 and 1877, relating to a 'redemption fund,' as having been in force since the adoption of the Constitution of 1879, and no transfer made

or even suggested to be made to the 'redemption of the public debt fund' for investment in bonds and coupons in the manner originally provided for in the acts of 1874 and 1877.

"While respondent admits that he favors the policy of retiring State bonds and past due coupons with the interest tax surplus, he respectfully submits to the court that for the reasons herein stated the Board of Liquidation has no authority to make the proposed purchase of bonds and coupons, and respondent no authority to make the necessary disbursement therefor."

A close analysis of respondent's return discloses the following to be his defences, viz.:

First—That the Constitution of 1879 has revoked and withdrawn from the auditor and the treasurer all the powers conferred by Act No. 3 of 1874.

Second—That the continuing appropriations for interest and the redemption of bonds provided by said act, and those supplementary thereto, were and are inconsistent with Art. 43 of the Constitution of 1879.

Third—That the Constitution of 1879 limits taxation to six (6) mills, and makes no provision for a sinking fund, and that no legislative enactment, since its adoption, has made any such provision.

Fourth—That, by various legislative acts since 1880, the surplus of the interest collected has been given an altogether different destination, inconsistent with the provisions of the acts of 1874 and 1877.

Fifth—That all the foregoing precepts of constitutional and statute law favor his theory, and are diametrically opposed to those advanced by the relator.

On the trial there was judgment in favor of the relator, and the respondent has appealed.

I.

It is important that the various provisions of the legislative enactments, and those of the Constitution of 1879, and the debt ordinances of 1879 and 1882, should be reproduced and collated for the purposes of comparison and careful analysis, as upon such comparison and analysis must depend a proper decision of the questions that are propounded in the respondent's return.

We have, therefore, collated and reproduced them in the order of their dates, viz.:

Section 7 of Act 8 of 1874—the funding law provides—

That a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the State is hereby annually levied, and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated to that purpose, and no other. And that it shall be deemed a felony for the Fiscal Agent or any officer of the State or board of liquidators to divert the said fund from its legitimate channel as provided, and upon conviction the said party shall be liable to imprisonment for not more than ten years nor less than two, at the discretion of the court. If there shall, during any year, be a surplus arising from said tax after paying all interest falling due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act, said purchases to be made by said board of liquidation, from the lowest offers, after due notice; *provided*, that the total tax for interest and all other State purposes, except the support of public schools, shall never hereafter exceed twelve and a half mills on the dollar. The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the Auditor and Treasurer, and the said board, respectively, to collect said tax annually, and pay said interest and redeem the said bonds until the same shall be fully discharged.

This act was, at the same session of the Legislature, given the shape of a proposed constitutional amendment, and it was subsequently submitted to and adopted by the people as a part of the organic law.

The issue of consolidated bonds authorized by the General Assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor; to secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury.

Whenever the debt of the State shall have been reduced below twenty-five million dollars, the constitutional limit shall remain at the lowest point reached, beyond which the public debt shall not thereafter be increased; and this rule continue in operation until the debt is reduced to fifteen million dollars, beyond which it shall not be increased. Nor shall taxation for all State purposes, excepting the support of public schools, ever exceed twelve and a half mills on the dollar of the assessed valuation of the real and personal property in the State, except in case of war or invasion.

The revenue of each year derived from taxation upon real, personal and mixed property, or from licenses, shall be devoted solely to the expenses of the said year

for which it shall be raised, excepting any surplus remain, which shall be directed to sinking the public debt. All appropriations and claims in excess of revenue shall be null and void, and the State shall in no manner provide for their payment.

In pursuance of the funding statute and the constitutional amendment of 1874, the Legislature of 1877 passed the following act, to-wit:

In addition to the duties already prescribed, it shall be the duty of the Treasurer to set apart annually out of the proceeds of the five and a half mills tax, an amount equal to the interest coupons maturing on the first day of July of said year and the first day of January next following, and the surplus, if any, remaining after said amounts shall have been collected and set aside, as well as the surplus, if any, resulting from the provisions of the third amendment to the Constitution of the State, proposed January twenty-fourth, eighteen hundred and seventy-four, and ratified at the general election held on the second of November, eighteen hundred and seventy-four, shall be deposited with the Fiscal Agent at credit of a separate and distinct fund, to be called and known as the "Redemption of the Public Debt Fund," and shall be used exclusively, under the direction of said Board of Liquidation, for the retirement and sinking of consolidated bonds and past due interest coupon to be purchased from bidders offering the same at the lowest price, after thirty days' notice in the official journal of the State, and such other papers as may be selected by the board, which notice shall be given whenever said Redemption Fund shall amount to one hundred thousand dollars —Extract from Sec. 9, Act 58 of 1877, Regular Session.

That section two of said Act amending and re-enacting section nine of the original Act number three shall be and is hereby amended and re-enacted so that that portion of section nine as amended in said Act number fifty-eight beginning from the title "Treasurer" to and including the word "President," preceding the word "Auditor," shall read as follows, to-wit: "Treasurer—First: In addition to the duties already prescribed, it shall be the duty of the Treasurer to set apart annually, out of the proceeds of the five and a half mills tax, an amount equal to the interest coupons maturing on the first day of July of said year and the first day of January next following, and the surplus, if any, remaining after said amounts shall have been collected and set aside, as well as the surplus, if any, resulting from the provisions of third amendment of the Constitution of the State proposed January twenty-four, eighteen hundred and seventy-four, and ratified at the general election held on the second of November, eighteen hundred and seventy-four, shall be deposited with the Fiscal Agent at credit of a separate and distinct fund, to be called and known as the 'Redemption of the Public Debt Fund,' and such amount as may remain at credit of the said redemption fund after deducting therefrom the sum necessary to cover matured coupons remaining in arrear shall be used exclusively, under the direction of said Board of Liquidation, for the retirement and sinking of consolidated bonds to be purchased from bidders offering the same at the lowest price, after thirty days' notice in the official journal of the State and such other papers as may be selected by the board, which notice shall be given whenever said redemption fund shall amount to one hundred thousand dollars. If any deficit occur in the collection of the five and a half mills interest tax of any year, leaving interest coupons of said year unpaid, then, and only then, that portion of the surplus revenue deposited in conformity to this Act at credit of the Redemption of the Public Debt Fund which may be derived from sources other than the said five and a half mills tax may be

applied by the Board of Liquidation to the payment of such unpaid coupons with a view of maintaining the credit of the State. In conformity to the constitutional amendment number three, of one thousand eight hundred and seventy-four, it is hereby made the duty of the Treasurer to keep separate accounts of the income and expenditures of each fund in each year, and after setting apart or paying out an amount thereof equal to the appropriations and warrants lawfully made against each of said funds, the surplus, if any remain, shall be immediately deposited by the Treasurer at the credit of the 'Redemption of the Public Debt Fund,' and the Board of Liquidation is hereby authorized to require from the Treasurer or Fiscal Agent at any time a statement of the condition of any such fund or funds. No bid shall be entertained for any bond to an amount exceeding par; and the board shall always have reserved to itself the right and privilege of rejecting any and all bids, but shall publish in the official journal the result of its proceedings concerning such redemption or refusal to accept any of the bids made. If bids are offered in excess of the surplus on hand, they shall be reduced to correspond with such surplus, and the award be made in favor of the lowest bidder or bidders. For all bonds redeemed and retired in conformity to law payment shall be made by the State Treasurer on the order of the board, attested by its president and secretary."—Sec. 1 of Act 77 of 1887, Extra Session.

The following is an exact reproduction of the Debt ordinance of 1879, viz.:

STATE DEBT.

ARTICLE 1. *Be it ordained by the people of the State of Louisiana, in Convention assembled*, That the interest to be paid on the consolidated bonds of the State of Louisiana be and is hereby fixed at two per cent. per annum for five years from the first of January, 1880, three per cent. per annum for fifteen years, and four per cent. per annum thereafter, payable semi-annually; and there shall be levied an annual tax sufficient for the full payment of said interest, not exceeding three mills, the limit of all State tax being hereby fixed at six mills; *provided*, the holders of consolidated bonds may, at their option, demand in exchange for the bonds held by them, bonds of the denomination of five dollars, one hundred dollars, five hundred dollars, one thousand dollars, to be issued at the rate of seventy-five cents on the dollar of bonds held and to be surrendered by such holders, the said new issue to bear interest at the rate of four per cent. per annum, payable semi-annually.

ART. 2. The holders of the consolidated bonds may at any time present their bonds to the Treasurer of the State, or to an agent to be appointed by the Governor —one in the city of New York and the other in the city of London—and the said Treasurer or agent, as the case may be, shall indorse or stamp thereon the words, 'interest reduced to two per cent per annum for five years from January 1, 1880, three per cent. per annum for fifteen years and four per cent. per annum thereafter;" *provided*, the holder or holders of said bonds may apply to the Treasurer for an exchange of bonds, as provided in the preceding article.

ART. 3. *Be it further ordained*, That the coupon of said consolidated bonds falling due the first of January, 1880, be and the same is hereby remitted, and any interest taxes collected to meet said coupon are hereby transferred to defray the expenses of the State government.

Be it further ordained, and it is hereby ordained by this Constitutional Convention, That the foregoing provisions and articles relative to the consolidated debt shall not form a part of this Constitution, except as hereinafter provided, as follows:

At the election held for the ratification or rejection of this Constitution, it shall be lawful for each voter to have written or printed on his ballot the words, "For ordinance relative to State debt," or the words, "Against ordinance relative to State debt," and in the event that a majority of the ballots so cast have indorsed on them the words "For ordinance relative to State debt," then the said foregoing provisions and articles of this ordinance shall form a part of the Constitution submitted if the same is ratified; and if a majority of the votes so cast shall have indorsed on them the words, "Against ordinance relative to State debt," then said provisions and articles shall form no part of this Constitution.

The following is from the debt ordinance as amended in 1882, viz.:

ACT NO. 76 OF 1882.

STATE DEBT.

ARTICLE 1. *Be it ordained by the people of the State of Louisiana, as provided by law*, That the State Debt Ordinance be amended so as to read as follows: That the interest to be paid on the Consolidated Bonds of the State of Louisiana be and is hereby fixed at two per centum per annum for five years, from the first day of January, one thousand eight hundred and eighty (1880), and four per centum per annum thereafter, payable semi-annually; and there shall be levied an annual tax sufficient for the full payment of said interest, not exceeding three mills, the limit of State tax for all purposes being hereby fixed at six mills; and said bonds and coupons shall be duly stamped: "Interest reduced to two per centum per annum for five years from January 1, one thousand eight hundred and eighty, and four per centum per annum thereafter."

This amendment was regularly submitted to and adopted by the people, and became part of the Constitution in 1884, and has remained unaltered to this time.

We append, also, the following summary of the legislative enactments since adopted and upon which the treasurer principally relies—the selections are made from the brief of the respondent's counsel, viz.:

"The Legislature has frequently construed the Debt Ordinance as repealing the legislative provisions creating the Redemption of Public Debt Fund and providing for the purchase of bonds. The first act of this character is Act No. 77 of 1880, which, in the first paragraph of Sec. 4, provides that 'the surplus of said tax shall be applied to the establishment, maintenance and support of the free public schools throughout the State.'

"The next expression of the Legislature upon this subject is to be found in Joint Resolution No. 75, of the Session of 1882, which provides that 'the excess of interest in the treasury collected or collectible, and appropriated to pay the interest on the Consolidated and Constitutional bonds of the State, and General Account Fund,

shall be turned over and credited to the General Fund of 1880, 1881, 1882, 1883 and 1884, the excess of each year being credited to the General Fund of said year.' The Legislature, the same year, in Act No. 96 of 1882, in the first paragraph of Sec. 77, ordained that 'the surplus of said tax should be applied to the General Fund.'

"Again in 1884, by Act No. 107, at pp. 138 and 139, the surplus of the Interest Tax for 1884 was applied to the Current School Fund, and for 1885 and subsequent years to the General Fund.

"Act No. 98 of 1886, treating of the disposition of the Interest Fund, contains the following provision: 'That not more than $480,000 of the interest, so collected, shall be applied to the payment of the interest due on said consolidated bonds and the surplus of said tax to be applied to the General Fund.'

" The last expression of legislative construction of the State Debt Ordinance will be found in Act No. 85 of 1888, Sec. 89, where the same disposition is made of the surplus as in the previous acts hereinabove quoted.

" It appears from the acts cited above that the uniform interpretation of all the Legislatures, that have acted upon the question, is, that the State Debt Ordinance of 1879 abolished the 'Redemption of the Public Debt Fund,' and authorized the levy of a tax for the payment of the *interest only*, the surplus, if any, arising from said tax to be under control of the Legislature and payable only in pursuance of specific appropriation thereof, under the limitations imposed by Art. 43 of the Constitution of 1879 and all other limitations of that instrument."

II.

Taking a comprehensive view of the foregoing provisions of law —statutory and constitutional—it is evident that there is imposed upon the respondent the ministerial duty that is clearly outlined in the relator's petition; therefore, the question of controlling importance in this case is whether or not same have been repealed by subsequent legislation. For it is provided by the funding act of 1874 that the levy and appropriation therein provided for "shall authorize and make it the duty of the auditor and the treasurer, and the said board, respectively, to collect said tax annually, and pay said interest and redeem the said bonds, until the same shall be fully discharged."

The constitutional amendment of 1874 provides that "the tax required for the payment of the principal and interest of said bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds, as the principal and interest shall fall due," etc.

The legislative enactment of 1877 (regular session) provides that the treasurer shall "set apart annually, out of the proceeds of the five and one-half mill tax, an amount equal to the interest coupons maturing on the first day of July of said year, and the first day of January next following; and the surplus, if any remaining after said amounts shall have been collected and set aside, as well as the surplus, if any, resulting from the provisions of the third amendment to the Constitution of the State, proposed January 24, 1874, * * * shall be deposited with the fiscal agent at credit of a specific and distinct fund to be called and known as the 'Redemption of the Public Debt Fund,' and shall be used exclusively, under the direction of said Board of Liquidation, for the retirement and sinking of consolidated bonds and past due coupons, to be purchased from bidders offering the same at the lowest price," etc.

The legislative enactment of 1877 (extra session) further elaborates and enlarges the powers of the officers charged with the performance of the functions of the funding law, and declares that "it shall be the duty of the Treasurer to set apart annually, out of the proceeds of the five and a half mills tax, an amount equal to the interest coupons maturing on the 1st day of July of said year, and the 1st day of January next following; and the surplus, if any, remaining after said amounts shall have been collected and set aside, as well as the surplus, if any, resulting from the provisions of the third amendment of the Constitution * * * shall be deposited with the fiscal agent at a credit of a separate and distinct fund, to be called the 'Redemption of the Public Debt Fund,' etc." And it further provides that "it is hereby made the duty of the Treasurer to keep separate accounts of the income and expenditures of each fund in each year; and, after setting apart or paying out an amount thereof equal to the appropriations and warrants lawfully made against each of said funds, the surplus, if any remain, shall be immediately deposited by the Treasurer at the credit of the Redemption of the Public Debt Fund, and the Board of Liquidation is hereby authorized to require from the Treasurer or from Fiscal Agent, at any time, a statement of the condition of any such fund or funds."

To determine whether the foregoing have been repealed we must keep in mind other provisions of the funding laws and the constitutional amendment of 1874, as well as those quoted, and compare them with the provisions of the debt ordinance of 1879, which, it is contended, had the legal effect of producing an *implied* repeal thereof.

The constitutional amendment of 1874 declares amongst other things that the issue of consolidated bonds, authorized by the funding law of that year, created a valid contract between the State and the bondholders "which the State could by no means impair. That the tax required for the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest."

But the most important provision of said amendment is to be found in its last section, which reads as follows, viz.:

"The revenue of each year derived from taxation upon real, personal and mixed property, or from licenses, shall be devoted solely to the expenses of the said year for which it shall be raised, *excepting any surplus remain, which shall be directed to sinking the public debt.*"

In this wise the legislation of 1877 appears to follow the plain and unambiguous precepts of the constitutional amendment, both of which plainly contemplate and require the surplus interest accumulations to be seggregated and kept apart from other funds, and especially consecrated to "the sinking fund of the public debt," capital and interest.

The remaining question for consideration is the purport and effect of the debt ordinance of 1879 upon the provisions of the funding laws and the constitutional amendment of 1874.

It must, however, be at once observed and kept in mind, that the debt ordinance forms no part of the Constitution, because it is therein formally declared "that the foregoing provisions and articles relative to the consolidated debt shall not form a part of this Constitution, except as hereinafter provided," etc.

Its provisions are entirely independent and separate from the body of the Constitution, though, at the same time, constituting an integral part of the organic law.

Now what are the provisions of the Debt Ordinance? When paraphrased they are as follows, to-wit:

First—That the interest to be paid on the consolidated bonds of the State be and is hereby fixed at two per cent. per annum for five years from the first of January, 1880; three per cent. per annum for fifteen years, and four per cent. per annum thereafter, payable semi-annually.

Second—That there shall be levied an annual tax sufficient for the full payment of said interest, not exceeding three mills, the limit of all State tax being fixed at six mills.

Third—That holders of said bonds were given the *option* to demand, in exchange for the bonds held by them, bonds of the denomination of $5, $100, $500 and $1000, to be issued at the rate of seventy-five cents on the dollar of bonds held, and to be surrendered by such holders, the said new issue to bear interest at the rate of four per cent. per annum.

Fourth—That the holders of consolidated bonds not desiring to make such exchange can be permitted to have their bonds stamped with the words "interest reduced," etc., so as to enable them to have the benefit of interest collections therein provided.

These are all the fundamental provisions of the ordinance. They deal exclusively with the *interest*, and not with the *capital* of the bonds, which were allowed to remain in *statu quo*. The fact of the bondholders being given the *option* to surrender their holdings and to receive other bonds in exchange, on the terms proposed therein, did not impair—nor purport to impair—the force or validity of those bonds as a binding contract between the State and the bondholders; nor do we think the framers of the ordinance entertained any such idea. And the *interest*, constituting, as it does in law, a part of the contract, was no more interfered with by the ordinance than was the capital of the bond, except as to the *rate* of interest bondholders were to receive. And the acceptance of this reduced interest depended upon the option of the bondholder, who was at liberty to decline to receive same; though it must be confessed that it left him without remedy to enforce the payment of the full rate of seven per cent., unless the State consented to let herself be sued. But, this question aside, it is clear that the ordinance not only did not impair the obligation of the contract, but specially recognized the existence and validity of the bonds, with their reduced interest, and made special provision for the payment of the interest, though the amount of the interest tax was reduced so as to correspond with the reduced rate of interest.

True it is, that Section three of the ordinance declares "that the coupons of said consolidated bonds falling due the first day of January, 1880, be and the same are hereby *remitted*, and any interest taxes collected to meet said coupons are hereby transferred to defray the expenses of the State government;" but this declaration only serves to enforce the view we have expressed in reference to the bonds and interest generally.

It is evident that it was not the intention or object of the framers of the ordinance to abrogate the constitutional amendment of 1874, or to repeal any legislative enactment under it; though it was confessedly their purpose and object to disembarrass the State by superinducing the bondholders' acceptance of a more economical and juster rate of interest upon its large bonded indebtedness, which was of more than questioned validity.

True it is that the Supreme Court did employ the language attributed to it in the respondent's return, which is to the effect "that the *object* of the State in adopting the debt ordinance of 1879 was to stop the further payment of the promised tax," but this expression was closely coupled in the same sentence with the further expression that it was likewise intended "to prevent the disbursing officers from using the revenue from previous levies to pay the interest falling due in January, 1880." But we are at a loss to perceive on what language of the *ordinance* the court predicated the expression that it was the object of its framers to prevent the payment of "the *principal and interest maturing afterward;*" and the further expression "that the Constitution of 1879 on its face takes away the power of the executive officers to comply with the act of 1874," etc.; and there is no article or provision of the body of the Constitution referred to, in the opinion of the court, which justifies this observation.

On the contary, the Constitution formally and in terms declares that "all rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate; and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, shall continue as if said Constitution had not been adopted." Const., Art. 258.

This provision is certainly broad enough to save and except from its repealing effect the amendment of 1874 and legislation under it.

In addition to this, it is a noteworthy fact that the Supreme Court, in Louisiana vs. Jumel, 107 U. S. 711—the case relied upon by the

respondent—dealt with the interest coupons of 1880 alone, and consequently any expression of opinion in reference to other interest coupons or bonds was not authoritative as a precedent.

Our conclusion on this branch of the case is that the debt ordinance of 1879 did not reach and repeal the constitutional amendment of 1874 nor the legislation under it, but, on the contrary, left them in full force—with the solitary exception stated with regard to the reduction of the *rate* of interest and the diminution of the *amount* of the interest tax imputable thereto.

On this question our learned brother of the lower court expressed the following view, to-wit:

" It seems to me, that the Constitution of 1879 made no change whatever in the consolidated bonded debt of the State, except as to the remission of the interest called for by the coupons due January 1, 1880, and the reduction of the rate of interest from 7 per cent. by gradual steps to the rate at which it is now current, say 4 per cent. Dealing with the bonded debt, fixing the rate of interest and levying the tax to meet the annual interest, constituted an acknowledgment of the principal of the debt itself, as solemn and imposing as could have been made. The limit fixed in 1874 to the volume of the debt, the maturity of the debt at forty years from January 1, 1874, and the obligation of the State to meet and pay it within this term, together with all the essential details for the determination and funding, excluding the one particular of a change in the rate of interest, were as perfectly implied in the State debt ordinance of that instrument as if they had been reproduced and stated at length. When the Constitution of 1879 levied the annual tax to pay the interest it seems to me it did not mean to direct that the interest alone should be paid, and that the principal debt should not be paid, nor that if there should be an excess of money resulting from the interest tax, that such excess should be diverted to some purpose other than the purchase and retirement of the bonds, as occasion might admit, which purchase and retirement formed a part of the stipulations of the " contract " evinced by the legislation of 1874 and 1877 in the funding of said debt. On the contrary, it seems to me that all this was matter of necessary implication, which kept in force the special laws necessary for the continued funding and management and payment and cancellation of the bonded debt, in capital as well as in interest. By the terms of Art. 258 of that Constitution, all " rights,"

"claims," "contracts" and "laws" in force were continued in force, as if the said Constitution had not been adopted; provided, there was no inconsistency between them and its provisions. Wherein there is any inconsistency between its provisions and the acts of 1874 and 1877, except in the one particular of the rate of the annual interest on the bonded debt, I do not see. The amendment of 1874 to the Constitution, which was adopted for the purpose of carrying the funding act into full effect, levied the annual tax. The appropriation was thus then made, *quoad hoc*, specially, as a continuing appropriation, and wholly independent of the article which regulates ordinary State appropriations, by legislative act, and prohibits the withdrawal of money from the treasury without such act; and so, in like manner, the State debt ordinance, in the Constitution of 1879, has exactly the same effect—*i. e.*, as regards the bonded debt, it operates as a special continuing appropriation, untrammeled by the restrictions of Art. 43, which relates to other matters than the State debt.

"It has never been contended that the debt funded and still being funded, under the acts of 1874 and 1877, does not exist, nor that it must not be paid. No one has disputed the existence or the powers and duties of the board of liquidation under said acts to deal with said bonded debt. That board has been in the full exercise of its functions, under said acts, since 1875, in all respects, as if there had been no change in the organic law in 1879. All these facts borne in mind, it would seem passing strange if, in the one essential function, of greatest moment to the credit of the State and to the best interests of the people—to-wit: the payment and cancellation of this interest-bearing debt out of funds now available, to the extent of near half a million of dollars—the powers of this liquidating board should be held as of no efficacy to that end. How could such be the conclusion when the same acts which called it into existence, the same acts which provided all things regarding the bonded debt as it exists to-day, excepting only the rate of interest, authorized and directed this board to use all accumulated surplus of interest money for the purchase and retirement of the bonds in capital and interest, *et id usque ad finem*, until the entire bonded debt, that has so burdened the people, shall be entirely canceled?"

In these views we concur, as we regard them conclusive and unanswerable.

If the theory of the respondent were not adequately and sufficiently answered it would find sufficient answer in the constitutional amendment of 1884, whereby the rate of interest was *increased*—thus specifically recognizing the debt as well as interest, and putting a different interpretation on the debt amendment of 1879 from the one entertained by the Supreme Court.

Recurring to the amendment of 1874, it is worthy of observation that it directs and requires that if there shall remain any *surplus* of revenue in any year it "*shall* be directed to sinking the *public debt*," and that language necessarily includes the principal as well as the interest.

Having reached the conclusion that the amendment is still a part of the organic law, unrepealed by the Constitution of 1879, or the debt ordinance thereto appended; and the State finding herself able and willing to perform an act of justice to her *contract* creditors, we feel disposed to sanction that desire and put its provisions in force, notwithstanding same have lain dormant for a time.

III.

On the second proposition of the respondent to the effect that the continuing appropriation for interest and the redemption of the bonds, provided in the funding legislation, is inconsistent with Art. 43 of the Constitution of 1879, little be said; for, as already shown, the debt ordinance segregated the debt settlement from all other questions that were treated of in the body of the Constitution, and the two were separately submitted to the people; and hence the two are to be construed as harmonizing, unless necessarily repugnant to each other.

And in our opinion such is not the case in the instance suggested by the respondent.

IV.

Much the same answer may be made to the third proposition of the respondent, that the Constitution limits taxation to six (6) mills, and makes no provision for a sinking fund. But, as we have seen, the constitutional amendment of 1874—which is still in force—declares, in mandatory terms, that any *surplus* of interest shall be devoted to "*the sinking of the public debt*," the subsequent legislation on the subject does revoke such provision, and same is perfectly compatible therewith.

V.

In so far as any legislative enactments of dates subsequent to the adoption of the Constitution may have given a different destination to the tax interest surplus of any one or more years, they can not furnish to this court a rule for the interpretation of the constitutional amendment of 1874, as the latter is paramount and must prevail over any contrary statutory enactment.

All statutes enacted subsequent to the adoption of the debt ordinance must be construed in conformity thereto. And, in fact, all of such subsequent enactments dealt with, and only proposed to deal with, an *existing fund* already collected under existing laws, and could only lead to the supposition that the laws of 1874 and 1877 were not operative on said funds.

All of said statutes are simply revenue laws of the several years in which they were enacted, and did not in terms, or in effect, repeal the laws of 1874 and 1877; and had such been the purpose of the Legislature in their enactment, it was vain and nugatory on account of the substance of the funding act of 1874 having become absorbed into the constitutional amendment of that year, and it not having since been abrogated or repealed.

These legislative acts are thus treated and disposed of by the district judge, viz.:

"I have also examined the revenue acts of 1884-86-88. As legislative interpretations regarding the bonded debt and its settlement they are met by the contrary inferences to be drawn from the joint resolution No. 72 of 1888, and the failure of the house bill No. 280 in 1892.

"As repealing statutes, express or by implication, I think they do not affect the legislation of 1874 and 1877, for several reasons:

"1. They are current revenue, or 'ways and means' acts, and in their titles there is not the slightest mention or reference to the matters of essential substance contained in the acts of 1874 and 1877, which it is argued they have repealed.

"2. They are not on the same subject matter as the acts of 1874 and 1877.

"3. They do not purport to prohibit the application of the interest fund to the cancellation and retirement of the capital of the debt, as directed by the acts of 1874 and 1877, whenever there is a surplus.

"4. If the levy of the continuing tax, by the State debt ordinance of 1879, be in itself an appropriation by the Constitution, they can have no effect to the contrary.

"The same considerations are applicable to the joint resolution of 1882, but on the admitted facts regarding the several funds, none of these acts, unless possibly the act of 1882, could have any effect, in any event, upon the present issue."

In these views we also concur, as we believe them to be sound and correct.

We have given this case most careful consideration—such as the gravity of the same demanded, and are of the opinion that the judgment appealed from is correct, and we adopt the concluding part of the opinion of the district judge as our own, as it is the embodiment of the law, as well as of the philosophy of the case:

"Thus interpreting the laws herein involved, my opinion is that the interest fund, required to be levied by the debt ordinance of 1879, is the debt fund, sacred not only for the current interest, but for the capital of the debt. I think that, as a constitutional appropriation, there is no authority to divert it. I think that all the essential details adopted in 1874 and 1879 for the determination, funding, management and ultimate payment of the bonded debt are in full force, and that it is the duty of the Board of Liquidation, whenever there is a sufficient surplus, to promptly use it for the purchase and retirement of State bonds, and thus not only lightening the burdens of the people, but free the revenues of the State from the embarrassments of debts that were fastened upon her in the evil days that befell her in long ago, in order that they may find application more liberally for the education, protection and general welfare of her people."

Judgment affirmed.

Mr. Justice Parlange recused, having been a member of the Board of Liquidation.

Mr. Justice McEnery absent, sick.

No. 11,412.

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THE STATE OF LOUISIANA VS. SILAS HILL.

1. The trial judge declined to give to the jury the following requested special charge, viz.:
"If the jury has a reasonable doubt whether the defendant was intoxicated to such a degree as to create a state of mental confusion, excluding the possibility of a specific intent to take life, or positive premeditation, then the verdict should be guilty of manslaughter."
2. Intoxication of the accused to such a degree as to render him incapable of malice in the perpetration of a homicide is a special defence, like a plea of insanity, and puts the burden of proving it upon the party urging it, and its truth must be established by a fair preponderance of evidence.
3. While it is the duty of the prosecution to make out the malicious intent of the accused in the perpetration of a homicide beyond a reasonable doubt, yet it is not its duty to prove a negative by showing that the accused was *not* intoxicated to such a degree as to render him incapable of entertaining malice at the time of the homicide beyond a reasonable doubt; and the trial judge was guilty of no error in refusing to so charge the jury.

APPEAL from the Seventh District Court, Parish of Tensas. *Montgomery, J.*

M. J. Cunningham, Attorney-General; *Joseph E. Randell*, District Attorney, and *R. B. Snyder* for the State, Appellee.

Young & Young for Defendant and Appellant.

The opinion of the court was delivered by

WATKINS, J. The defendant was convicted on a charge of murder and sentenced to death, and prosecutes an appeal from the judgment rendered, placing his sole reliance on the alleged error of the trial judge in refusing to give to the jury one requested special charge.

The special charge requested and refused was of the following tenor, to-wit:

"If the jury has a reasonable doubt whether the defendant was intoxicated to such a degree as to create a state of mental confusion, excluding the possibility of a specific intent to take life, or positive premeditation, then the verdict should be guilty of manslaughter."

The argument of defendant's counsel upon this proposition is that, inasmuch as evidence had gone to the jury as to the defendant's

state of intoxication at the time of the homicide, it was the province of the jury to determine the degree of intoxication, and whether it was sufficient to reduce the *grade* of the crime committed, from murder to manslaughter; and from that premise his contention is that, as the State must prove, beyond a reasonable doubt, every essential element of the crime charged, and as malicious intent or motive is an essential element of the crime of murder, the State was bound to prove that the accused was not so intoxicated as to render him incapable of entertaining malice toward the accused, and hence the defendant was entitled to the charge requested.

Or, in other words, that the defendant does not rely upon a special defence, but on the want of sufficient evidence to establish the existence of malice on the part of the defendant, on account of his drunkenness at the time of the homicide. Hence, if the evidence raised a reasonable doubt of *such a degree* of intoxication as to create an impossibility of the existence of malicious intent on part of the accused, the grade of the crime is reduced to manslaughter.

On the part of the State, the argument is that the intoxication of the accused is resorted to as a special defense, like a plea of insanity, and that the rules of law provided to test the latter should be applied in this case to test the degree of the defendant's intoxication.

He cites De Rance's case, 34 An. 190, wherein the court had under consideration the special defence of insanity, and in their opinion said, viz.:

"The prosecution must prove all the essential, affirmative allegations (of the indictment) beyond a reasonable doubt, (but) the burden of proof on the plea (of insanity) rests upon the party urging it, and its truth must also be established beyond a reasonable doubt."

He also cites Coleman's case, 27 An. 692.

We are of the opinion that the plea of drunkenness is a special defense, and, like any other, must be proved by the party urging it, to the satisfaction of the jury.

It was the duty of the State to establish the malicious homicide of the deceased, at the hands of the accused, beyond a reasonable doubt; and if in making that proof the drunkenness of the defendant was developed, it was a circumstance for the consideration of the jury, along with other proven facts of the case, in determining the felonious intent of the homicide. But it does not follow that it was the duty of the State to make proof of a negative, by showing, be-

yond a reasonable doubt, that the defendant's state of intoxication was of a degree not to interfere with his judgment and intelligence, or preclude the possibility of his entertaining malice toward the deceased

The trial judge properly declined to give the requested special charge, and the accused is without grounds of complaint.

Judgment affirmed.

Mr. Justice McEnery absent sick.

No. 11,411.

WM. L. LANGRIDGE, SHERIFF, ETC., VS. THE JUDGE OF THE TWENTY-FIRST JUDICIAL DISTRICT COURT.

When a legal proceeding is commenced against a person, whether resident within the jurisdiction of the court in which it is begun or not, the defendant must be brought in court, in some one of the forms provided by law, or a voluntary appearance must be made on his behalf that jurisdiction may attach.

When the proceedings are on a bond for the appearance of an accused, the call on the principal and the surety, by the sheriff under the order of court, must be made in order that the judgment pronounced may be valid. This formality is jurisdictional.

The plaintiff in injunction, having alleged that there was no process whatever, and having complied with prerequisites by taking the oath required and furnishing bond to obtain an injunction, the court of her domicil has jurisdiction to hear the cause on the merits.

Writs of *certiorari* and prohibition will not issue restraining the District Court from hearing the case on the merits; it being appealable to this court.

APPLICATION for *Certiorari* and Prohibition.

Alfred E. Billings for the Relator.

William L. Thompson for the Respondent.

The opinion of the court was delivered by

BREAUX, J. The plaintiff in injunction, Eliza Roach, signed a bond as surety, in the sum of $250, for the appearance of one Thomas Jenkins to answer to the charge of forgery before the Seventeenth Judicial District Court for the parish of St. Mary.

A *fi. fa.* having been issued and her property seized by the sheriff of the parish of Jefferson, the surety, Eliza Roach, sued out an injunc-

tion to prevent the sale of her property, consisting of certain lots in the village of McDonoghville, in the parish of Jefferson, in which she is domiciled.

The grounds of injunction are broadly stated:

That she has never received any legal notification to produce the body of Thomas Jenkins.

That no citation was ever served upon her or any other legal proceeding had against her; that she never received any legal notification to pay any sum of money; that Jenkins is now in jail in the parish of St. Mary, and that the bond for his appearance should be canceled, because its conditions are complied with.

That the seizure is void.

The relator interposed a rule in the District Court to dissolve the injunction, upon the ground that the Judicial District Court for the parish of Jefferson was without jurisdiction to enjoin the execution or declare null a judgment of the District Court of the parish of St. Mary.

Further, that the court was without jurisdiction to enjoin the execution or declare the judgment null.

There is no evidence before us that any judgment was pronounced.

The rule before the court *a qua* was discharged.

The District Court stated as reason for discharging the rule that, if the court is without jurisdiction to enjoin the execution or declare the nullity of the judgment, the plaintiff might show improper execution on the merits. and that certain allegations of the plaintiff in rule to dissolve the injunction were unsupported by needful proof.

After the court had thus ruled an exception was filed setting forth the same grounds as in the rule.

The respondent judge, in answer to the rule *nisi* issued by this court returns that the *fi. fa.* is a nullity for want of notice of judgment; that the only evidence submitted on the trial of the rule to dissolve and in support of the plea to the jurisdiction was the writ of *fi. fa.* enjoined, and that there has been no joinder and no opportunity afforded him to determine the issues of law and fact.

The case is appealable to this court.

The relator propounds one question as involving all the issues of the case.

Has the Twenty-first Judicial District Court for the parish of Jefferson jurisdiction to declare null a judgment pronounced by the Seventeenth Judicial District Court for the parish of St. Mary, and enjoin the execution of that judgment at the instance of a defendant?

Let us see:

In the first place the question contains a *petitio principii*, for it assumes as proven that there is a judgment enjoined, the nullity of which is sought.

There is no evidence before us of any judgment whatever.

The plaintiff in injunction, Eliza Roach, has assumed the responsibility of alleging in general terms that none of the required formalities to obtain a judgment against her have been observed.

At this stage of the proceedings the issue is the existence *vel non* of any of the required formalities.

There are grounds alleged for the injunction entirely *ultra* the law authorizing an injunction, and without the least foundation in law, such as that the surety received no citation or notice.

If this refers to a citation preceding the motion to forfeit the bond the position is absolutely untenable and should not be for a moment considered, for the law is clear that no notice or citation is required, nor is the surety to be notified to produce the body of the principal, further than the call made by the sheriff under the order of the court, on the principal first, and afterward on the surety if the principal fails to answer when called.

If this call, which is made in court, is the formality the defendant contends has not been complied with, it was indispensable and vitiates proceedings subsequent.

The broad allegation of the petition for the injunction includes non-service of any notice of judgment of forfeiture.

In some respects the grounds of injunction are not clearly defined.

Sufficient remains to justify the ruling that the case be heard on the merits.

The allegations upon the face of the papers suggest the unavoidable inference that there was not actual process to sustain a *fi. fa.*

In Lawes et al. vs. Chinn, 4 Martin N. S., page 388, this court held the injunction was a remedial writ against the sheriff to prevent an immediate injury which could not otherwise be effectually warded off, and the plaintiff was necessarily cited to gainsay the allegations of the party and assert his rights. *Ex necessitate rei*, it must have issued

by the judge of the parish in which the execution was to be carried into effect.

The question received brief consideration in case of Police Jury of West Baton Rouge vs. Michel et al., 4 An. 84, and in Hobgood vs. Brown, 2 An. 323.

The plea is not that the process is voidable, but that it is void.

It would be a hardship to compel a person to repair to a distant parish to plead if a process is absolutely void.

The jurisdiction *quoad* the seizure does not attach unless it is predicated of process sufficient to give the seizure the appearance of legal sanction.

If entirely wanting in process, there can be no seizure made that will divest the court of the domicil and of the *situs* of the property from arresting a void seizure.

We express no opinion with reference to any of the issues, save to decide that the plaintiff in injunction, having assumed the burden of proving that all proceedings are void, should be heard in support of the allegations.

The rule that the execution of judgment belongs to the court by which the cause has been tried remains unchanged, and is not enlarged by our decision in this case.

We adhere to the principles laid down in Arthurs vs. Sheriff, 43 An. 416, from which we do not depart by deciding that in proceedings entirely void a defendant is not without remedy before the court of his domicil.

That the litigation may be abbreviated and the plaintiff in injunction may be enabled to avoid costs to a large amount, adding to her burden as security, we have been led to analyse the allegations of her petition and to read between the lines. We are inclined to think, without assuming too much, that ultimately the issues will reduce themselves to the want, possibly of the service of notice of judgment, or possibly as to the effect of a waiver. In that case, the District Court of St. Mary parish alone has jurisdiction.

It had jurisdiction to have the principal called and his surety, and to pronounce judgment on their default. That was the condition of the bond. The want of notice of judgment is not jurisdictional.

It is therefore ordered and decreed that the rule *nisi* be rescinded, and the application herein be refused.

No. 11,352.

STATE OF LOUISIANA VS. JEAN DUBARRY.

An ordinance within the power delegated is not illegal.

Act 116 of 1898 delegates to the City Council the authority to prescribe by ordinance "the manner private markets shall be kept."

If the power is not specially announced, the terms of the act cover an implied power in the council.

Under an implied power the reasonableness of an ordinance is a judicial question for the courts.

The records do not disclose any evidence to show unreasonableness of the ordinance.

Without evidence establishing the unreasonableness of the ordinance the court will not decide that it is unreasonable, and that the plan proposed by the defendant for his market house is reasonable, and offers every security for cleanliness and ventilation.

The ordinance assailed by the defendant is reasonable; it is not oppressive, nor is it *ultra vires*.

APPEAL from the First Recorder's Court of the City of New Orleans. *Whitaker, J.*

T. R. Rozier, Assistant City Attorney, and *E. A. O'Sullivan*, City Attorney, for Plaintiff and Appellee.

W. J. Waguespack for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. The accused was convicted and fined for violating an ordinance of the City Council relating to private markets, and from the judgment condemning him he appeals.

His grounds before this court are that the ordinance is unreasonable, oppressive and *ultra vires*.

The ordinance assailed for illegality prescribes that the private market shall measure 10x15 in superficial area, 16 feet in height from floor to ceiling; that it shall moreover be separated from the nearest building by a distance of 3⅓ feet, and be well ventilated; the floor to be of flagging or cement; that the stalls and stands be washed and cleaned daily, and kept in the highest state of cleanliness.

The defendant admits that his building is less than sixteen feet from floor to ceiling; that it is less than three and one-half feet from

the nearest building; that the floor is of wood, and not of flagging and cement.

The right to keep private markets was granted by the Legislature, and in thus granting the right they were subordinated to the police power for the maintenance of cleanliness and salubrity.

To the City Council the power to govern and regulate the private markets was delegated.

It is not unreasonable in a city imperfectly drained, located on low lands near marshes and swamps, in a warm climate, to adopt an ordinance requiring that the building shall be ventilated and the floor cemented.

It is, on the contrary, reasonable to guard against local causes, and to be alert not to expose a large population in a malarious atmosphere.

The defendant wishes to substitute his judgment regarding these market buildings to that exercised by the public authorities in adopting an ordinance they deemed the public health required.

Should we allow the demand, and the defendant were to establish a private market such as his interest or judgment suggests, others also would doubtless be pleased to make a similar departure from the requirement of the ordinance assailed by the defendant, and in a short time all health ordinances regulating these markets would be defeated and rendered useless.

Such prostration of regulations for public health can not be thought of for a moment.

The defendant argues that the ordinance operates oppressively.

The ordinance is one ordained under a law of necessity.

In order that an ordinance may be declared oppressive it must be partial and unjust.

The ordinance is general and applies to all who follow the occupation followed by the defendant. They are all subject to the same law, and required to conform to the regulation imposed in public interest.

The licenses are issued upon the condition that the occupation shall be conducted in accordance with the laws and ordinances adopted under proper authority.

Nor can it be said that the ordinance is unjust in the sense that it is oppressive.

The regulations of public corporations for their police and health are obligatory upon all persons who are within their authority, provided they contain nothing unauthorized or contrary to law.

In obeying this ordinance the defendant will not be subjected to anything unjust and unreasonable.

Ordinances to maintain the cleanliness of market places are not unjust, but are prompted by the highest regard for the safety of the community, and it is only an act of justice to take precautionary measures to suppress anything that may be hurtful to life or prejudicial to health.

Every person owes a certain duty to the public, and one of these duties require, that the public shall not be exposed to nuisances of any kind.

It was to prevent possible nuisances that the ordinance was adopted, and in thus guarding against the possibility of a nuisance no injustice has been committed.

The position of the defendant that the ordinance is *ultra* the authority of the council is equally as untenable.

The question suggests itself, why was the law No. 116 of 1888 enacted if it does not grant additional authority to the council?

Prior to its enactment the police power of the council was sufficient to enact all proper regulations falling under that power, under the terms of the charter.

If it did not delegate authority to the council to adopt the ordinance assailed, the act added nothing to previously existing authority.

We do not so interpret the act.

The legislative will is obvious and expressed with clearness sufficient not to be misunderstood.

By the terms of the statute the City Council is authorized to adopt such ordinances for the government and regulation of private markets as they in their discretion may deem proper, and they "may prescribe by ordinance the manner in which such private markets shall be kept."

This covers the authority to adopt such ordinances as will maintain proper cleanliness and secure sufficient ventilation.

The least negligence may be hurtful and affect the public; the injury possible being common to all the ordinance is reasonable, not oppressive and not *ultra vires*.

When properly regulated and conducted with due regard to cleanliness, defendant's trade is not an offensive trade, and is as legitimate as any other business, but this lawful and necessary occupation must be exercised under proper regulations to protect the public.

Moreover, there is no evidence of record showing that the ordinance is unreasonable.

Without any testimony whatever before us upon the subject, we will not assume that the ordinance assailed is unreasonable.

Without any evidence to prove its unreasonableness the illegality on that ground can not be established.

The occupation being legitimate in every respect, highly useful as well as indispensable, we have heretofore held that it should not, for that reason, be subjected to needless restrictions.

We will not extend the scope of that decision so as to relieve them from the necessity of closely and actively observing every ordinance enacted under the statutes to protect against the least negligence that may be hurtful and affect the public.

The judgment appealed from is affirmed at appellant's costs.

No. 11,283.

HENRY CASPAR VS. J. G. PROSDAME.

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Under the general issue in a suit for damages for injury to feeling and humiliation caused by an assault by the defendant on the plaintiff, and by the use of opprobrious epithets by the former, evidence of irritation and provocation was admissible in mitigation of damages, but was not admissible to defeat the action.

When the clear right of a person is invaded, he must be entitled to an action against the party who inflicted the injury.

Assaulting a person and denouncing him in the presence of bystanders in a court building, in the presence of officers of the court as a thief, and as having robbed the party denouncing him, and his threats to cowhide the person, are indignities and insults actionable in themselves, without reference to character or reputation.

Even if a person has a bad character he has a right to be let alone, and to immunity from personal attacks.

Even if he has no reputation, he should not be denounced as a thief if he is not a thief.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Moise & Cahn for Plaintiff and Appellant.

Dinkelspiel & Hart for Defendant and Appellee.

The opinion of the court was delivered by

BREAUX, J. The plaintiff, a young man, was the patentee of a collar and cuff rack, used for advertising purposes, by placing the advertisement in the rack.

He contracted in writing with the defendant to place his advertisement in his racks and put them in a stated number of shaving saloons and billiard halls in the city of New Orleans.

No particular names or places where he was to place his racks containing defendant's advertisement were mentioned in the contract.

The defendant having refused to pay the balance due to the plaintiff under the terms of the contract, the plaintiff brought suit against him before the First City Court for the amount he claimed.

At the first fixing of the case for trial it was not tried.

Immediately after the continuance, as plaintiff was leaving the court room, he passed the defendant, who called upon him to stop, at the same time said that he wished to see him.

Walking together to the hall of the court building, the defendant, between his two friends who were standing near, pressed the plaintiff against the wall and assaulted him; put his hand upon him in a fit of anger.

The defendant, Prosdame, at the time, uttered words abusive, vituperative and insulting, and charged the plaintiff, Caspar, with having violated his contract; with having robbed him of his money; with being a thief, and threatened to cowhide him.

A short time after the occurrence the plaintiff called at the office of one of the witnesses, who testified that he was quite excited and began crying.

The petition alleges that defendant's conduct was malicious, for the purpose of injuring petitioner, and prevent him from prosecuting his case against the defendant, and for the further purpose of humiliating and insulting him.

Prior to the date of the insult it had been the intention of the plaintiff to leave the city.

After he had been thus treated he determined to remain, and at his instance his case against the defendant was set for trial.

After the testimony had been heard on the trial, the court pronounced judgment in his favor.

The defendant, without availing himself of the right of appeal, paid the judgment.

The judgment sustained Caspar's interpretation of the contract.

The plaintiff subsequently brought suit and prayed for actual, punitory and exemplary damages in the sum of $5000.

The defendant pleaded a general denial.

The judgment of the court *a qua* rejected plaintiff's demand.

The court admitted testimony which was offered to prove irritation and provocation.

The court admitted it and limited its effect to the mitigation of damages, and decided that it was not admissible under the general issue to prove irritation and provocation.

To the ruling a bill of exception was reserved by plaintiff.

The testimony offered to prove provocation and cause of irritation consisted of verbal conditions superadded to the written contract, the defendant contends.

The only evidence upon the subject is that of the plaintiff and of the defendant; one asserts that there was additional stipulation, the other denies.

The evidence was admissible in mitigation, and was properly admitted with the restriction made. Hitchcock vs. North, 5 R. 328.

There was no testimony offered of character or reputation of the plaintiff.

The plaintiff claims damages for injury to his feelings and for the humiliation to which he has been subjected.

No claim is made for injury to his character or reputation.

Our first impressions were that the restricted character of the demand left no ground for damages, and that the cause of action alleged was not *per se* actionable; that character and reputation are requisites to be considered in suits of this nature.

Upon further consideration and examination of authorities we conclude that they are not always indispensable.

If a person has no character, or even a bad character, he has a right to be let alone; to immunity from personal attacks and assaults.

It is a personal right, independent of character.

If made without sufficient provocation the assault is grievous and wanton, and the lack of character of the person assaulted is not a

sufficient defense or justification of the act, although it may be a fact considered in mitigation of damages.

Damages in the case of assault include the humiliation and the mental and bodily suffering.

Relative to reputation, as an indispensable element of damages in cases of the character of the one at bar.

The person may be an entire stranger; still, he certainly has a right of action to protect himself from the charge of having committed larceny, if he is entirely innocent.

A man of a reputation not good, may have that said of him which is untrue, and thereby subjected to wrong.

The merest vagabond should not be denounced as a thief if he is not.

He would only be without right of action if the charge be true.

If it be untrue, it would be a sad condition to let him remain remediless on account of reports, true or false, not having the least bearing upon the offence charged.

The assault and the words charged as having been uttered are proven.

The character of the occurrence was aggravated by the time and place at which the indignity and insult were offered.

It was at the court building, in the presence of officers of the court, and immediately after the case, by agreement of counsel, had been postponed to another day.

In Mohrman vs. Ohse, 17 An. 64, the court held that the words were slanderous (the defendant was denounced as a thief), and from the nature of the epithets used and the place where uttered the evident purpose was to destroy confidence in the person slandered.

In the case at bar loss and impairment of confidence are not issues.

The humiliation and the wrong are, and the place and circumstances add to the injury inflicted.

An assault was committed. The plaintiff was without cause charged with a crime.

The defendant therefore owes damages which must be assessed with reference to the testimony admitted in mitigation of damages.

"Damages may be assessed without calculating altogether on the pecuniary loss or the privation of pecuniary gain to the party. *

* * In the assessment of damages under this rule, as well as

in cases of offences and *quasi* offences, much discretion must be left to the judge." R. C. C. 1934.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered and decreed, that plaintiff have judgment against the defendant for the sum of $500, with interest from date of judgment, and that the defendant pay the costs of both courts.

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No. 10,652.

STATE OF LOUISIANA VS. MAURICE J. HART.

1. It appearing that constitutional bonds which had been prepared by the proper officers appointed by law for that purpose, possessing all the *indicia* of genuine bonds of the State, had been delivered into the custody of the State Treasurer for the purpose of making an exchange thereof for consolidated bonds of the State, in pursuance of the provisions of the Constitution and law, and that the said Treasurer had fraudulently and illegally entered in the blank spaces or shields upon said constitutional bonds numbers purporting to indicate the numbers of the consolidated bond surrendered in exchange therefor, and that he had subsequently and surreptitiously issued and placed same into circulation as *bona fide* and genuine obligations of the State, same are fatally stricken with absolute nullity in their inception, and antecedent to their issuance, and being placed in circulation as unconditional promises of the sovereign to pay.
2. Such paper is void in the hands of any holder, as it is the settled rule of the law merchant that when it is shown that the instrument was given for a consideration which, by statute, is declared void, the original taint follows it, and it is void in the hands of every holder, however innocent, and that no party can enforce a negotiable instrument if it be not genuine or if it be executed by a party *incapable of entering into the contract in which it was given.*
3. But the rule of law is, as established by the weight and current of authority, as well as the law merchant, that the fraud which shifts the burden of proof upon the holder to establish the *bona fides* of his acquisition must be in the consideration or the representations used in obtaining the execution of the instrument, and not in the after breach of trust in diverting it from the uses for which it was intended.
4. In order to constitute a valid security, any bond or negotiable obligation of the State must be issued on authority of the Constitution and statute law of the State; and the powers and duties of officers and agents of the Government, whether Federal or State, are defined by statute, which is notice to the world of the limitations that are placed upon their authority.

APPEAL from the Civil District Court for the Parish of Orleans.
King, J.

M. J. Cunningham, Attorney General, and *Walter H. Rogers* for Plaintiff and Appellee:

The State may not be sued in reconvention without her consent.

Forged instruments convey no title. State bonds are not negotiable instruments in the sense of the law merchant. To so denominate them is an abuse of their true character and purpose.

The government does not undertake to guarantee to any person the fidelity of the officers and agents it employs.

This action is similar to the case of the State of Louisiana vs. Laura Gaines, No 10,619 of the docket of this court, now pending on rehearing.

As to the character of the bonds (constitutional, issued under the terms of Act 121 of 1880) the facts are identical. The State found some $54,000 of these bonds in the possession of the defendant, caused them to be sequestered, and they are now in the hands of the sheriff. The case was tried in the District Court before a jury and there was a verdict for plaintiff and judgment accordingly.

Farrar, Jonas & Kruttschnitt for Defendant and Appellant:

1. Under Act 121 of 1880, p. 154 of the Acts of that year, bonds of the State, perfect in every respect and ready to be issued, were delivered to the Treasurer of the State of Louisiana, who had the power, without the concurrence, knowledge or consent of any other official whomsoever, to issue such bonds in exchange for consolidated bonds of the State of Louisiana, and the law provided for no record whatsoever to be kept in the Treasurer's office of the fact of any exchange of bonds, nor did it require the performance of any formalities of any kind whatsoever in reference to such issue, save the trifling one of identifying the new bond with the old one for which it was exchanged, by placing a number upon the new bond the same as the one on the bond for which it was given in exchange.
2. When a State enters the markets of the world to borrow money or to pay her debts in bonds or commercial paper of any form transferable by endorsement or delivery, she becomes subject to the same rules of the law merchant that affect or operate on private persons dealing in the same class of paper, by which rules any "innocent holder before maturity" is exempt from inquiry into the circumstances under which the obligation was first put into circulation. Floyd Acceptance, 7 Wall. 675; Cooke vs. United States, 91 U. S. 396; Murray vs. Charleston, 96 U. S. 445; Louisiana vs. Jumel, 107 U. S. 740; United States vs. Bank of Metropolis, 15 Pet. 392; United States vs. State Bank, 96 U. S. 30; Morgan vs. United States, 113 U. S. 483.
3. When commercial paper is signed by one person purporting to bind another, the holder must, at his peril, see that the authority to issue the paper exists, but if the authority does exist, he is not bound to inquire whether or not it has been properly exercised.
4. The bonds in this case having been issued by the officer authorized by law to issue them, and in manner and form required by law, are in the hands of any *bona fide* holder for value valid and legal obligations of the State, even though fraudulently issued by the Treasurer. The power to issue existed, however wrongful its exercise may have been. The holder was bound to see that the power existed; he was not bound to see that it was properly exercised.

5. Even if it be assumed that the State can repudiate these obligations, by showing that the Treasurer issued the bonds fraudulently, and for a different purpose than that prescribed by the Constitution and the Act of 1880, nevertheless plaintiff is entitled to recover a most only $31,000 of bonds out of the $54,000 sued for, because no evidence whatever is produced tending to show the rest of the bonds to have been fraudulently issued by the Treasurer.
6. Defendant is a *bona fide* holder, for value, of these bonds, acquired by him before maturity, unaffected by any knowledge of the frauds of the State Treasurer, and in his hands they are valid obligations of the State.
7. The State is not authorized in law or in equity to invoke judicial process to wrest from the hands of her apparent creditor the sole evidence of the latter's claim against her.

The opinion of the court was delivered by

WATKINS, J. Claim is made of the defendant for the restitution to the State treasury of the aggregate amount of *sixty-one thousand dollars* of alleged *fraudulently issued* and *illegal constitutional bonds of the State of Louisiana*, of the denomination of one thousand dollars and five hundred dollars respectively, on the substantial averment that all legal and valid bonds of the State are by law entrusted to the care and custody of the State Treasurer for safe keeping, and that, in violation of his trust, one E. A. Burke, Treasurer, did illegally and fraudulently embezzle and convert to his own use, $71,000 of *certain* constitutional bonds, taking same from the treasury of the State and placing them in the hands of the defendant and other persons, from whom he obtained large sums of money thereon.

More specifically stated, the averments of the State's petition are, that in pursuance of the *constitutional* debt ordinance, the issuance of certain bonds, known as constitutional bonds, was authorized, and outstanding bonds of the State, known as *consolidated bonds*, were permitted to be given in exchange therefor, at 75 *per centum* of their face value.

That the State caused $7,000,000 of such *constitutional* bonds to be engraved; and of those bonds the Auditor and Treasurer presented to the Governor for his signature $621,000, and he signed same, and caused the great seal of the State to be thereto affixed; and, when thus completed and perfected, same were turned over to E. A. Burke, Treasurer, for the purpose of consummating an exchange thereof for consolidated bonds.

That *consolidated* bonds amounting *only* to the sum of $290,200 were offered for exchange and *actually* surrendered and exchanged; and for which there were *actually* given in exchange *constitutional* bonds to the amount of $217,600; and *that beyond that sum "there has been no legal and proper issue of said bonds."*

That the said *constitutional* bonds were, by law, entrusted to the care and custody of the State Treasurer, and same can only be *issued or used* by him in lawful and proper exchange for *consolidated* bonds in the manner aforesaid.

That, notwithstanding such legal impediments, said Burke, Treasurer, "did illegally and fraudulently embezzle and convert to his own use $71,000 of said *constitutional* bonds, taking same out of the treasury of the State and placing them, *after fraudulently numbering them*, in possession of divers persons, and among them M. J. Hart, and obtained large sums of money therefor, said Burke receiving a large portion of the money obtained.

"That said bonds are the property of the State of Louisiana, and represent, in value, the sum of $71,000, as well as (being) the evidence of the fact that $100,000 of valid consolidated bonds have been paid and destroyed.

"That the interest at the rate of 4 *per cent. per annum*, from January 1, 1880, has been paid on said fraudulent bonds, and collected from the State, which sum, together with said fraudulent bonds, should be returned to the State.

"That Burke thus delivered to the defendant $61,000 of said fraudulent constitutional bonds, which are represented by certain specified numbers, forty-four of which are alleged to be of the denomination of one thousand dollars each, and thirty-two of them of the denomination of five hundred dollars each.

"That said bonds had been pledged by Hart to various banks of the city of New Orleans, "but since the first day of September, 1890, at the call of the banks, he has *retaken possession* of said bonds, and same are now in his custody and control.

"That the bonds should be returned to the State treasury, where, as the property of the State, they of right belong."

The prayer of the petition is for the maintenance of the sequestration of the bonds, and for judgment condemning defendant to return the bonds and interest to the State treasury.

Prefaced by a general denial, defendant's answer is that, at date of institution of this suit he was in possession of seventy constitutional bonds, being in part the bonds described in plaintiff's petition. It then gives a description and an enumeration of the bonds in his possession, which includes *all* of the five hundred dollar bonds, and thirty-eight of the one-thousand dollar bonds mentioned and described in plaintiff's petition—only omitting from the list the one thousand dollars bonds bearing the numbers 243, 244, 245, 246, 247 and 248, aggregating in amount $6000.

It avers that defendant acquired said bonds in due course of business, before their maturity in good faith, and for a full and valuable consideration. That same were and are negotiable instruments, and he can not be, in any manner, affected by any defects of title in any one from whom he acquired same.

It then proceeds to specify in detail the time, manner and circumstances under which he acquired same, a fair summary of which is, that during the winter and spring of 1888 he made to E. A. Burke sundry loans of money, aggregating $60,000 in amount, and for which loans Burke executed his demand notes, payable to defendant's order, to which said bonds, in similar amounts, were attached as collateral security; and that same were discounted at market rates prevailing at the time.

The answer further represents that the effort on the part of the State to recover the bonds is an attempt to impair the obligation of protected contracts existing between him and the State, and to divest him of his vested rights of property therein, in violation of the State and Federal Constitutions.

In reconvention, the defendant prays for the recognition of the bonds in suit as legal and valid obligations of the State, entitling him to hold and retain same in his possession in pledge to secure the amount of his loans to Burke, with interest and cost.

On the issues thus stated, the cause went to trial before a jury, and a verdict was rendered in favor of the State for the restitution of the bonds named without interest, and thereupon judgment was rendered accordingly against the defendant, commanding him to return same—rejecting and disallowing the State's demand for interest, and the defendant's reconventional demand.

After making an unsuccessful effort to obtain a new trial, defendant obtained and prosecutes this appeal; and, as this plaintiff has

made no answer to this appeal, requesting any amendment of the judgment appealed from, the questions for consideration are limited to two, viz.:

First—Whether the *constitutional* bonds in controversy were fraudulent and illegal in *their* inception and issuance, thus entitling the State to judgment declaring same absolutely null and void.

Second—Whether, in any court, the defendant is entitled to take judgment against the State, upon his reconvention demand—there being invoked no enabling statute authorizing him to sue the State.

In the petition of the State the issue is squarely made that the constitutional bonds sued for were absolutely illegal and void in their inception—the specific averment being, that they were entrusted to the custody and safe keeping of the Treasurer, for issuance in exchange for consolidated bonds, in pursuance of the constitutional debt ordinance; the same having been engraved, signed and sealed, previously, as directed by a special statute, as contemplated by said ordinance.

The further specific averment of the petition is, that there were $620,000, in amount, of bonds thus *prepared* and turned over to the Treasurer for purposes of exchange, but only *two hundred and ninety thousand two hundred dollars* of *consolidated* bonds were surrendered in exchange, and for which only *two hundred and seventeen thousand six hundred dollars* of constitutional bonds were *issued* legally and given in exchange; and "that beyond that sum there has been *no legal and proper issue of bonds.*"

That notwithstanding said constitutional bonds had only been entrusted to said Treasurer for the *single* purpose of effecting the exchange aforesaid, and same could only be issued, or used by him in making a lawful exchange, said Treasurer "did illegally and fraudulently embezzle and convert to his own use $71,000 of said constitutional bonds, taking same out of the treasury of the State, and placing them in the possession of divers persons, and among them M. J. Hart (the defendant), and obtained large sums of money therefor, said Burke (Treasurer) receiving a large portion of the money obtained."

That is to say, that whilst the bonds in question were perfect in form and possessed of all the *indicia* of legal and valid constitutional bonds, yet they were only entrusted to the State Treasurer for the purpose of exchanging them for consolidated bonds, and that the

Treasurer embezzled them and put them in circulation fraudulently and surreptitiously, *without any constitutional bonds having been received in exchange therefor—that is to say, without consideration.*

In the petition it is further alleged that upon the face of each one of said constitutional bonds there are two spaces or shields left blank when same were delivered into the custody and possession of the Treasurer, same being intended by the terms of the statute in question for the number of the *consolidated* bond surrendered to be placed in one, and the number of the *constitutional* bond issued in exchange therefor to be placed in the other, and that said Burke, Treasurer, falsely and fraudulently forged the numbers in the said constitutional bonds that he embezzled, in order to give them the appearance of having been validly and legally issued in exchange for consolidated bonds, when in fact they were not.

On the trial the validity of the bonds at date of their issuance was the question principally mooted, and with regard to which a large amount of evidence was taken.

In the brief of the Attorney General is given a full and complete *résumé* of this evidence, and we have embodied it as the most accurate way of conveying an idea of it.

It is as follows:

CONSTITUTIONAL BONDS HELD BY M. J. HART, AND NOW IN POSSESSION OF THE SHERIFF UNDER WRIT OF SEQUESTRATION.

Constitutional Bond.	Purporting to have been	
No. 199 for $1000	Exchanged for C. B. 1751 (No such bond was ever exchanged.)	Pledged by Hart to Germania Savings Bank.
No. 196 for $1000	Purporting to have been Exchanged for C. B. 251 (No such bond was ever exchanged.)	Pledged by Hart to Union National Bank.
No. 201 for $1000	Purporting to have been Exchanged for C. B. 5606 This bond 5606 was delivered for exchange to E. A. Burke by First National Bank of Baton Rouge, July 6, 1883, together with other bonds and constitutional bonds given in exchange. It was not destroyed. It was pledged by M. J. Hart to Henry Bier, December, 1885, with No. 13 coupon. Coupon No. 25 was with Cockerton in August, 1886, and it is now held by Nathan Simmons	Pledged by Hart to Bank of Commerce.
No. 203 for $1000	Purporting to have been Exchanged for C. B. 3434 This bond was exchanged by Citizens Bank in 1880 and destroyed May 6, 1882.	Pledged by Hart to Bank of Commerce.
No. 204 for $1000	Purporting to have been Exchanged for 3435 C. B. Do. as above No. 203	

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No. 205 for $1000	Purporting to have been Exchanged for C. B. 3486 Do. as above No. 203	Pledged by Hart to Bank of Commerce.
No. 207 for $1000	Purporting to have been Exchanged for C. B. 7487 (No such bond was ever exchanged.)	Pledged by Hart to Hibernia National Bank.
No. 209 for $1000	Purporting to have been Exchanged for C. B. 7777 (This bond was exchanged by Hill, Garten & Co., of New York, in 1880, and destroyed May 6, 1882.)	Pledged by Hart to Bank of Commerce.
No. 210 for $1000	Purporting to have been Exchanged for C. B. 5238 (This bond was exchanged by Stauffer & Macready in 1880, and destroyed May 6, 1882.)	Pledged by Hart to Bank of Commerce.
Constitutional Bond. No. 211 for $1000	Purporting to have been Exchanged for C. B. 9188 (This bond was exchanged by G. Townsend in 1880 and destroyed May 6, 1882.)	Pledged by Hart to Hibernia National Bank.
No. 212 for $1000	Purporting to have been Exchanged for C. B. 6539 (This bond was exchanged by G. Townsend in 1880 and destroyed May 6, 1882.)	Pledged by Hart to Bank of Commerce.
No. 213 for $1000	Purporting to have been Exchanged for C. B. 7513 (This bond was exchanged by G. Townsend in 1880 and destroyed May 6, 1882.)	Pledged by Hart to Hibernia National Bank.
No. 214 for $1000	Purporting to have been Exchanged for C. B. 2488 (This bond was exchanged by G. Townsend in 1880 and destroyed May 6, 1882.)	Pledged by Hart to Bank of Commerce.
No. 215 for $1000	Purporting to have been Exchanged for C B 4151 (This bond exchanged by Wm. Grant in 1880 and destroyed on May 6, 1882.)	Pledged by Hart to Hibernia National Bank.
No. 216 for $1000	Purporting to have been Exchanged for C. B 7892 (This bond exchanged by Wm. Grant as above and destroyed May 6, 1882.)	Pledged by Hart to Hibernia National Bank.
No. 217 for $1000	Purporting to have been Exchanged for C. B. 4411 (This bond exchanged by Stauffer & Macready in 1880 and destroyed May 6, 1882.)	Pledged by Hart to Hibernia National Bank.
No. 218 for $1000	Purporting to have been Exchanged for C. B 5233 (This bond exchanged by Stauffer & Macready in 1880 and destroyed May 6, 1882.)	Pledged by Hart to Hibernia National Bank.
No. 219 for $1000	Purporting to have been Exchanged for C. B 1710 (This bond was exchanged by Wm. Grant in 1880 and destroyed May 6, 1882.)	Pledged by Hart to Bank of Commerce.
Constitutional Bond. No. 220 for $1000	Purporting to have been Exchanged for C B. 6930 (This bond was exchanged by G. Townsend in 1880 and destroyed May 6, 1882.)	Pledged by Hart to Germania Savings Bank.
No. 221 for $1000	Purporting to have been Exchanged for C. B. 5609 (This bond was exchanged by First National Bank of Baton Rouge, July 6, 1883; turned over to Burke; never destroyed. It was pledged by Hart to Bier in December, 1885, with coupon 18. Cockerton had coupon 25 in August, 1886. Now held by A. Luria for account of Oglesby, Jr.)	Pledged by Hart to Hibernia National Bank.

No. 224 for $1000	Purporting to have been Exchanged for C. B. 568 (This bond was exchanged by G. Townsend in 1880 and destroyed May 6, 1882.)	Pledged by Hart to Hibernia National Bank.
No. 226 for $1000	Purporting to have been Exchanged for C. B. 529 (No such bond was ever exchanged and is outstanding.)	
No. 227 for $1000	Purporting to have been Exchanged for C. B. 5614 (This bond was exchanged by First National Bank of Baton Rouge, July 6, 1883; never destroyed.) Coupon No. 25 with Cockerton, August, 1886.	
No. 228 for $1000	Purporting to have been Exchanged for C. B. 5609 (Same as above No. 221; this number duplicated.)	
No. 229 for $1000	Purporting to have been Exchanged for C. B. 5607 (This bond was exchanged by First National Bank of Baton Rouge, July 6, 1883; turned over to Burke; never destroyed.) Coupon No. 25 with Cockerton, August, 1886.	
No. 230 for $1000	Purporting to have been Exchanged for C. B. 5607 (Identical with 229. Duplicated.)	
No. 231 for $1000	Purporting to have been Exchanged for C. B. 2227	
No. 232 for $1000	Exchanged for C. B. 1778	
No. 233 for $1000	Exchanged for C. B. 234	
No. 234 for $1000	Exchanged for C. B. 2668	
No. 235 for $1000	Exchanged for C. B. 3443	
No. 236 for $1000	Exchanged for C. B. 3937	
No. 237 for $1000	Exchanged for C. B. 1716	
No. 238 for $1000	Exchanged for C. B. 4281	
No. 239 for $1000	Exchanged for C. B. 1408	
No. 240 for $1000	Exchanged for C. B 1650	
No. 241 for $1000	Exchanged for C. B. 7183	
No. 242 for $1000	Exchanged for C. B. 1751	

None of these Consolidated Bonds were exchanged, and are outstanding.

Constitutional Bond	Purporting to have been exchanged for Consolidated Bond		
No. 36 for $500	532	This Bond exchanged by First National Bank, Baton Rouge, July 6, 1883.	Pledged by M. J. Hart to Hibernia National Bank.
" 37 "	531	" " "	" "
" 38 "	529	" " "	" "
" 39 "	529—Duplicate.	" " "	" "
" 40 "	2439	" " "	" "
" 43 "	981	Never exchanged.	" "
" 44 "	982	" "	" "
" 45 "	4308	" "	" "
" 50 "	250	Exchanged by State National Bank.	" "
" 51 "	686	Exchanged by Stauffer, Macready & Co.	" "
" 52 "	1688	Exchanged by Wm. Grant	" "
" 53 "	1705	Exchanged by State National Bank.	" "
" 55 "	635	Never exchanged.	
" 57 "	847	" "	Pledged by Hart to Bank of Commerce.
" 58 "	715	" "	
" 59 "	633	Exchanged by Wm. Grant	" "
" 60 "	237	" " "	Pledged by Hart to Bank of Commerce.
" 61 "	996	" " "	

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No. 62 for $500	1713	Exchanged by State National Bank.		
" 63 "	1711	Exchanged by State National Bank.		
" 64 "	1709	Exchanged by State National Bank.	Pledged by Hart to Bank of Commerce.	
" 65 "	1707	Exchanged by State National Bank.	Pledged by Hart to Bank of Commerce.	
" 66 "	4808—Duplicate.	Never exchanged.		
" 67 "	1826	" "		
" 68 "	1964	" "	This is a Seminary bond and now held by Germania Savings Bank.	
" 69 "	3471	" "		
" 70 "	1270	" "		
" 71 "	3472	" "		
" 72 "	2489	" "		
" 73 "	2440	" "		
" 74 "	532—Duplicate.	Exchanged by State Nationul Bank.		
" 75 "	531—Duplicate.	Exchanged by State National Bank.		

RECAPITULATION.

38 Consolidated Bonds of $1000 ..... $38,000
32 Consolidated Bonds of $500 ..... 16,000—$54,000

The defendant does not seriously contest the facts enumerated, but rests his defence mainly on his alleged acquisition of the bonds in market overt and in good faith—they possessing all the *indicia* of valid and legal commercial instruments, entitling them to full faith and credit in commercial transactions—and that the effort of the State to recover them is an attempt to impair them as contracts protected under the State and Federal Constitutions.

Counsel for the defendant insist that the question presented for solution is *res nova*, and not covered by our decision in Pugh vs. Moore, Hyams & Co., 44 An. 209; and in their brief they insist that neither that case or any other decision of this court has involved the question in controversy.

In the Pugh case the court had under investigation that series of bonds known as the Agricultural and Mechanical College bonds, claim being made that same had been rendered void by the precept of the 233d article of the Constitution of 1879—same being consolidated bonds that were regularly and legally issued under and in pursuance of the funding laws, sanctioned by a constitutional amendment, and had, prior to the adoption of the Constitution of 1879, formed a part of bonded debt of the State.

The case of Herwig vs. Richardson & May, 44 An. 703, adopts and follows the opinion in the Pugh case, as it treats of Agricultural and Mechanical College bonds likewise.

Hence our conclusion is that defendant's counsel is correct in stating the question to be *res nova*, but in our view the situation and strength of his defence is not improved thereby.

It is the recognized and fundamental doctrine of the law merchant, and accepted by text writers and acted upon by the courts of the country, that the holder of a negotiable instrument is one who has acquired it in good faith for a valuable consideration from one capable of transferring it in the ordinary course of business, without notice of facts which impeach its validity as between antecedent parties; that such a holder possesses a title unaffected by those facts and may recover on the instrument, although it may be without any legal validity as between antecedent parties; even though it was originally *obtained* by fraud, theft or robbery. 1 Daniels on Negotiable Instruments, Sec. 769.

That author further states the doctrine thus:

"It is to be observed, as a general rule, the purchaser can never be placed on a worse footing than his transferrer, although he himself could not, in the first instance, have acquired the vantage ground occupied by such transferrer.

"And, therefore, even if he have notice that there was fraud in the inception of the paper, or that it was lost or stolen, or that the consideration had failed between some antecedent parties, or the paper be overdue and dishonored, he is, nevertheless, entitled to recover, provided his immediate vendor be a *bona fide* holder for value unaffected by any of these defences." *Id.* 803.

That principle is recognized in Commissioners vs. Clark, 94 U. S. 285, and sanctioned by us in Levy vs. Ford, 41 An. 870.

Thus it appears that the possessor of a negotiable instrument by such title is fully protected against charge of fraud, or theft, or failure of consideration between antecedent parties, and that the rule of property in such paper is so strong that such holder can convey to another a valid and indefeasible title, although the latter *knew* of its inherent defects.

But the learned author also states an important exception to that rule. He says:

"That *suspicion* of defect of title, or knowledge of circumstances which could excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title, * * * subject to the following modifications, or qualifications, viz.:

"1. That when it is shown by the defendant that the instrument *originated* in fraud or illegality, the burden of proof will be shifted

to the holder, and he must then prove that he is a *bona fide* holder for value.

"2. Where it is shown that the instrument was *given* for *a consideration which, by statute, is declared void, the original taint follows it, and it is void in the hands of every holder, however innocent.* And that *no party can enforce* a negotiable instrument if it *be not genuine, or if it be executed by a party incapable of entering into the contract in which it was given.*" (Our italics.) Id., Secs. 769, 806.

The author generalizes the principle and says:

"But the rule of the text is, we think, in conformity with the current and weight of authority and the law merchant. The fraud which shifts the burden of proof must have been in the *consideration, or representations used in obtaining the execution* of the instrument, and *not in the after breach of trust in diverting it from the uses for which it was intended.*" *Id.*, Sec. 791.

This distinction has been taken, substantially, in many reported cases: Jackson vs. Commercial Bank, 2 R. 128; Dick vs. Leverich, 11 La. 573; Merchants Bank vs. Exchange Bank, 16 La. 457; Bullitt vs. Howell, 11 An. 327.

It has also been taken by the Supreme Court in many cases: Otis vs. Cullom, 92 U. S. 447; Orleans vs. Platt, 99 U. S. 679; Shaw vs. Railroad Company, 101 U. S. 557; Collins vs. Gilbert, 94 U. S. 753; Cromwell vs. County of Sac., 96 U. S. 59.

It is also succinctly stated in a recent treatise on commercial paper that "in order to constitute a valid security, *any bond or negotiable obligation of the State must be issued on authority of the Constitution and statute law.*" 1 Randolph on Commercial Ins., Sec. 348.

And the same author lays down the general proposition that the powers and duties of officers and agents "of the government, whether Federal or State, are defined by statute, which is notice to the world of the limitations of their authority." *Id.*, Sec. 440.

He also announces the principle that "the defence of *original want of authority to issue a bond is available against all holders.*" *Id.*, Sec. 343.

On the facts above enumerated and on the various authorities cited, we are of opinion that the bonds sought to be recovered of the defendant were absolutely void in their incipiency, having been *issued* by E. A. Burke, Treasurer, without authority of law and in violation of the law—constitutional and statutory—authorizing their

issuance, in exchange for consolidated bonds duly and lawfully surrendered.

It has been clearly shown that they originated in fraud and issued by a person incapable, under the law, of entering into such a contract on the part of the State as they represent, same having been issued without the sanction or authority of the State. And it was the manifest and evident duty of all persons dealing in this exceptional class of commercial paper to take notice of the laws authorizing its issuance; such laws operating full notice to them of the manner and circumstances of their issuance and of the limitations that the law imposes upon the officers authorized to issue them.

In such case the original taint follows the instrument and renders it void in the hands of every holder, however innocent.

Hence the defence of *bona fides* can not avail the defendant—it being matter of no consequence that he acquires the bonds for a valuable consideration before maturity and without notice of the original informality of their issuance.

Counsel insist, however, that the statute authorizing the issuance of constitutional bonds gave to the Treasurer unlimited authority in the premises, and conferred upon him the power—without the concurrence or knowledge of any other officer—to issue such bonds in exchange for consolidated bonds, and that he was required to keep no record whatever of the fact, or manner of making the exchange; nor was he required to perform any given ceremony, or *formula*, "save the trifling one of identifying the new bond with the old one for which it was exchanged, by placing a number on the new bond, the same as the one upon the bond for which it was given."

But this was not a "*trifling*" ceremony by any means. On the contrary, it was of the utmost consequence and importance. The numbers placed on the shields or spaces left blank in the bonds when delivered to the Treasurer furnished the *only* means of identifying one *constitutional* bond from another, and furnished the only evidence of his faithful performance of duty in obtaining a *consolidated* bond in exchange therefor. The surrender of the consolidated bond was the only consideration there was for the constitutional bond; and when the Treasurer entered false and fictitious numbers in those spaces, or shields, he was, to all intents and purposes, guilty of a forgery. *Vide* Benson vs. McMahon, 127 U. S. 468, and authorities therein cited.

The constitutional bond being intended for exchange for a consolidated bond, same was not complete and perfect until the *exchange* had taken place and the number of the consolidated bond surrendered had been entered in the appropriate shield, as the law required, as evidence of such exchange having taken place.

Until this was done the constitutional bond did not become complete and perfect evidence of an obligation on the part of the State. That was requisite to make it an unconditional promise to pay.

In this we find an essential distinction between the constitutional bond in question and the United States treasury notes that were involved in Cook vs. United States, 91 U. S. 390; for, in that case, it was a fact conceded, that if the notes were *genuine* and unlawfully put in circulation, the government was bound for their payment to a *bona fide* holder; and the court said the notes were perfect and complete as soon as printed; that they did not require the signature of any officer; that "as soon as they had received the impression of all the plates and dies *necessary to perfect their form* they were ready for circulation and use," putting their opinion evidently upon the ground that the notes were *perfect* in form antecedent to time of their issuance. Consequently those notes did not come within the principle announced by Mr. Daniels, as being fraudulent in inception.

The defendant's counsel insist that the record furnishes no evidence of the bonds having been issued without consolidated bonds having been given in exchange therefor; and they deny the sufficiency of the proof which the Attorney General claims to have made by the introduction in evidence of a record found in the treasurer's office of the exchange of bonds, such record being unofficial, same not being by law required to be kept.

But the then Auditor, as a witness states, that the bond book contemplated and required by the act authorizing an exchange of bonds, to be kept by the Treasurer in the treasurer's office, was missing, and could not be found after diligent examination. He identifies an original list of the bonds exchanged as the one found in the treasurer's office—that is to say, the list of consolidated bonds that were surrendered, and are supposed to be destroyed. This list is denominated "Campbell's list," and was obtained from the treasurer's office at the expiration of the treasurer's term of office. The *data* furnished by this list is corroborated by the testimony of the clerk

who assisted the treasurer in effecting the exchanges that were made, and his testimony makes it evident that the bonds in controversy were fraudulently issued, without any consideration whatever.

We are unable to find in the record any evidence of the defendant's possession of the bonds numbered respectively 243, 244, 245, 246, 247 and 248. These numbers are not included in the list of bonds furnished by the Attorney General as those held by the defendant and in possession of the sheriff under the writ of sequestration.

Hence we are of opinion that same were incorrectly included in the verdict and judgment, which is, in other respects, correct.

In so far as the defendant's reconventional demand is concerned, little need be said, for the reason that it merely alleges the legality and binding force of the bonds in his hands as obligations of the State. And inasmuch as, in the course of our opinion on the merits of the principal demand, we were necessitated to pass upon the *primary validity* of the bonds, there is nothing left in the reconventional demand to decide. We therefore pretermit any expression of opinion on the question of law raised with regard to the jurisdiction of this court, under the circumstances of this case, to render a judgment against the State without the sanction of the General Assembly.

The judgment should be amended and affirmed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be so amended as to reject and disallow the plaintiff's demand in respect to bonds numbered, respectively, 243, 244, 245, 246, 247 and 248, for one thousand dollars each, and that in all other respects the same be affirmed—the defendant being exonerated from the payment of the costs of appeal.

Mr. Justice Parlange not being a member of this court at time of the argument and submission of this cause takes no part in the decision.

Mr. Justice McEnery absent, sick.

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46 54
115 943

No. 10,898.

STATE OF LOUISIANA VS. M. J. HART.

It is the settled jurisprudence of this court that the series of consolidated bonds of this [State known as Agricultural and Mechanical College and Seminary bonds are illegal and void, having been declared null by the Constitution of 1879; and this nullity may be reached and declared in the hands of any third holder, however innocent in their acquisition.

2. That any one who shall collect from the State interest on coupons clipped from said bonds, after he has become advised of the illegality of such bonds, is under obligation to make restitution to the State of the amounts thus paid by the State in error.
3. In case the State Treasurer, having official custody and possession of said illegal bonds, shall fraudulently and feloniously convert same to his own use, and embezzle same, and collect unduly the interest thereon, any one aiding, assisting and conspiring with said treasurer in so doing becomes liable to the State for the amount of interest thus illegally obtained.
4. In case such treasurer shall pledge such illegal bonds for a loan of money, and the pledgee shall, after obtaining knowledge of their illegality, repledge them again to other persons, this state of facts constitutes no defence to the State's demand for possession of the bonds.
5. It is within the power of the court, under such a state of facts, to reach and declare the nullity of the bonds, and decree the right of the State to have same surrendered to her.

APPEAL from the Civil District Court, Parish of Orleans. *King, J.*

M. J. Cunningham, Attorney General, and *Walter H. Rogers* for Plaintiff and Appellee:

The State is not responsible for bonds fraudulently issued and put into circulation.

The defendant having received into his possession the trust funds of the State, when he had no right or claim to them, and covered them into his own funds and returned them to the despoiler, must restore the same—a like condition results when he so receives the State funds and applies them to his personal use.

Farrar, Jonas & Kruttschnitt for Defendant and Appellant:

1. The State is not entitled to judgment for the surrender of the bonds claimed by her herein:

   (*a*) Because she has not prayed for that relief.

   (*b*) Because defendant acquired them *bona fide*, for value, and before maturity.

   (*c*) Because the State should not be allowed to invoke judicial process to wrest from the hands of her apparent creditor the sole evidence of the latter's claim against her. State vs. Gaines, decided by this Honorable Court, but pending on an application for a rehearing.

   The State is not entitled to recover the amounts alleged to have been collected by Hart from her for invalid coupons:

   (*a*) Because if defendant had collected the coupons, he would not be liable to return their amount. Cooke vs. the United States, 91 U. S. 404; State vs. Wells, Fargo & Co., 15 Cal. 336.

   (*b*) Because defendant did not collect the amount of any invalid coupons.

3. The State is not entitled to recover from the defendant the amount of checks purporting to be in payment of coupons, and alleged to have been issued by the Treasurer without consideration:
   (*a*) Because it is not shown that they were issued without consideration, or that they were not issued in payment for coupons.
   (*b*) Because it is not shown—as to most of the checks—that Hart ever had any thing to do with them.
4. Where a firm business is conducted in the name of one of the partners, his signature to a note or contract, or any other act done by him or in his name, is *prima facie* what it purports to be, his personal act. In other words, the name presumptively represents the person, and not the firm. Bates on Partnership, Sec. 440, and authorities there cited.

The opinion of the court was delivered by

WATKINS, J. In this suit three distinct claims are made against the defendant in behalf of the State as plaintiff, to-wit:

1. For ($30,760) thirty thousand seven hundred and sixty dollars, amount of certain checks issued by E. A. Burke, Treasurer, purporting to have been in payment of interest coupons on consolidated bonds that were in fact never surrendered, or, in other words, checks issued without any consideration, and payable to the defendant's order.

2. For ($24,300) twenty-four thousand three hundred dollars, as the amount of interest alleged to have been collected by the defendant, or through his procurement, on State bonds alleged to be void.

3. For the surrender and delivery of certain bonds that are alleged to be illegal and void, and unlawfully in the defendant's possession—that is to say, bonds bearing the numbers 728, 735, 755, 766, 775, 782, 814, 818, 829, 882, 897 and 890 of the denomination of $1000 each and aggregating $12,000 in amount, and the bonds bearing the numbers 1902, 1919, 1920, 1821, 1939, 1978, 1984, 2003, 2005, 2007, 2009, 1954, 1937, 2014, 1933, 1967, 1923, 1948, 1918, 1932, 1947, 2041, 2061, 2052, 2040, 2042, 2043, 1928, 1915, 1972, 1873, 1979, 2022, 1955, 1985, 2033, 1945, 1968, 2064, 1930 and 1935 of the denomination of $500 each, aggregating $20,500 in amount.

The prayer of the petition substantially conforms to its averments, though it does not contain any alternate demand for the value of the bonds as a *quantum meruit*, nor any request that judgment condemn the defendant to surrender same—though it is concluded with a demand for general relief.

The cause was tried by a jury, and a general verdict was rendered in favor of the State for the sum of fifty-five thousand and sixty dollars ($55,060) without interest, sustaining the writ of sequestration and commanding the defendant to surrender and deliver up all of the bonds claimed; but the judgment rendered commanded him to deliver certain specified bonds—that is to say, all of the $1000 bonds claimed in the petition, except bonds numbered 766 and 775, and further except bonds of the denomination of $500, numbered 2007, 2009, 2052, 2042, 1915 and 2033. And the judgment further decrees the delivery of bonds numbered respectively 1955, 2023, 2027, 2029, 2058 and 1942 of the denomination of $500 each, which are not claimed in the suit at all.

From that judgment the defendant has appealed.

The theory upon which the Attorney General proposes to hold the defendant is, as we gather from his petition, substantially as follows, viz.:

That under the provisions of the Constitution of 1879, which effected a settlement of the public debt, certain bonds, which had been issued to the Agricultural and Mechanical College and to the Louisiana State University or Seminary Fund under the act of 1874, were declared null and void, and ordered destroyed. That the sums due said institutions were recognized as a debt of the State, and ordered to be placed to the credit of said college and seminary of learning on the books of the State Auditor, and interest thereon paid out of the current school fund. That the aforesaid bonds were held by the State, through the Treasurer, in trust, and were in the possession of the Treasurer in 1879 and 1880 and up to April, 1888, as is evidenced by the official report he made to the Governor, and which was transmitted by him to the General Assembly in January, 1880, and which report was, by the General Assembly, printed and became a public document under the law, and contained a full and complete description of said college and seminary bonds—setting out their numbers and amounts. That the Agricultural and Mechanical College bonds were of the denomination of $1000 each, issued in pursuance of the funding act, it being Act No. 3 of 1874, and bore the numbers 710 to 905 inclusive, and aggregate in amount $196,300—including two small bonds for $100 each; and that the university or seminary bonds were of the denomination of $500 each, likewise issued under the funding act of 1874, and bore the numbers 1902 to 2065 inclusive,

consisting of 164, and aggregating in amount $82,200, including two small bonds of $100 each.

"That all of said *data* will more fully appear by reference to said official report of the Treasurer hereto annexed and made a part of (the petition) for greater certainty.

"That the Legislature of the State, by a formal resolution duly passed and signed in accordance with law, ordered said bonds destroyed," but that in fact said bonds were *not* destroyed, and that, on the contrary, said Treasurer "wrongfully and feloniously did convert the same to his own use and embezzled said described bonds."

That the defendant was interested with said Treasurer in his wrongful and illegal conversion of said bonds, and thereby became possessed of same, and pledged, dealt in, and negotiated by sale and exchange the said bonds, "and is the holder of a large quantity of them at this day."

That not only was the defendant a broker and made such negotiations for himself, but he acted and operated through other brokers and the stock exchange, and other agents, in selling and pledging said bonds.

That he formed a copartnership with Alfred Jardet and opened an account with himself in the negotiation of State bonds; and that he carried on a similar business through Lawrence Conroy as his agent—he using the defendant's name in signing notes, checks, etc.

Then the specific averment is made that the defendant did use, pledge and obtain money on said illegal and void bonds to the extent of $110,000, in this, to-wit:

That on the 17th of February, 1882, he pledged to the Germania National Bank $53,000 of said bonds, which he transferred as collateral, on that date, to E. H. Levy and L. Jardet.

That on the 8th of March, 1882, he pledged to the same bank, to secure a loan, $4000 of said bonds, and redeemed the same on May 12, 1882.

That on May 10, 1882, he pledged to same bank $20,000 of said bonds, and redeemed the same on the 18th of that month.

That on July 24, 1882, he pledged to said bank $18,000 of said bonds, and redeemed the same on the 19th of September following.

That on October 10, 1882, he secured a loan of $12,000 from the New Orleans National Bank on a pledge of such bonds, and on the

2d of November of same year he obtained another loan of $5000 on a pledge of such bonds.

The averment is then made "that in all of said transactions said Hart instructed his agents and partners to preserve the identical bonds delivered by him, and to all of which were attached coupons for interest past due and to become due."

That in October, 1883, he borrowed from John Klein & Co. a sum of money and pledged $28,000 of said bonds to secure the loan, and took up same on the 27th of October, 1885.

That from July, 1884, to December 28, 1885, he pledged to Henry Bier $54,200 of said bonds to secure a loan of $30,800, and to all of said bonds were attached interest coupons due from July, 1880, with the exception of bonds numbered 809, 821, 823, 843, 844, 853, 884 and 889, from which said defendant had cut the coupons, up to and including No. 20, due January, 1884.

It is further averred that the defendant, "in pursuance of his agreement and in consideration of his interest in said transactions with said E. A. Burke (treasurer) did compound, by way of account, with said Burke, as to all of said bonds—for it is true that said Burke did have in his possession *coupons of one hundred and five* of said bonds, part of which, *in August, 1881*, he, through his agent, one Cockerton, collected from the State, the State National Bank, all of which will appear in detail as follows, to-wit:

"Bonds numbered 719, 721, 722, 723, 724, 725, 728, 730, 731, 732, 733, 734, 738, 739, 740, 741, 742, 745, 846, 747, 748, 749, 750, 751, 752, 753, 754, 755, 760, 761, 762, 768, 870, 771, 775, 778, 780, 783, 789 and 797—a total of forty (40) coupons, *bearing the number 25*.

"Bonds numbered 732, 801, 802, 803, 806, 807, 808, 811, 814, 815, 816, 819, 821, 823, 824, 827, 831, 832, 835, 836, 837, 842, 843, 844, 851, 852, 853, 854, 863, 864, 865, 866, 867, 870, 872, 873, 877, 878, 882, 883, 884, 885, 886, 887, 889, 890, 891, 894, 895, 896, 802, 903, 904"—a total of fifty-three coupons, bearing the number 24.

Bonds numbered 3906, 5606, 5607, 5608, 5609, 5610, 5611, 5612, 5613, 5614, 5789 and 6185, a total of thirteen (13) coupons.

It is then averred "that the above numbers represent a total of 105 consolidated bonds of $1000 each, and are all numbers published as belonging to the Agricultural and Mechanical College bonds, and of bonds exchanged for constitutional bonds and not destroyed."

Besides these there were coupons of the five hundred dollar bonds of the following numbers, to-wit: 282, 1627, 1802, 1908, 1910, 1920, 1821, 1822, 1928, 1938, 1847, 1949, 1951, 1952, 1860, 1976, 1078, 1682 193, 194, 2002, 2003, 2005, 2041, 2013, 2018, 2037, 2029, 2032, 2035, 3840, 3041, 3042, 3043, 3047, 3048, 3055, 3056, 3058, 3059, 3060, 3061, 2438, 2440, a total of 44 coupons.

That the total amount represented by coupons is as follows, to-wit:

One coupon No. 24 at $20	$20 00
105 coupons No. 25 at $20	2,100 00
44 coupons No. 25 at $10	440 00
2 coupons No. 25 at $2	4 00
Total amount	$2,564 00

The averment is then made that in February, 1886, the defendant pledged to the Germania National Bank $109,700 of said bonds to secure a loan, and that said bonds remained thus pledged until the 21st of March, 1887; and on the 1st of April, 1887, he pledged to the Mutual National Bank $100,000 of said bonds to secure a loan of $85,000, which was paid on the 1st of November, 1887.

That said negotiations continued, until, in part, the pledging of said bonds was changed, to-wit: "In January, 1888, and from said date, up to September, 1888, when said Hart, through his broker, *sold* $65,000 of said bonds, and the same are now held by various persons in this city; and in addition thereto, the said Hart *has now in his possession* of said bonds" numbers given above and reiterated in the judgment, aggregating $32,500—that is to say, thirteen one thousand dollar bonds, and forty-one five hundred dollar bonds.

Then it is further alleged that the defendant, in addition to the bonds enumerated, viz.: the Agricultural and Seminary bonds, "used as in the manner set forth, by pledging, and did pledge and negotiate by sale and exchange, certain consolidated bonds of the State, and numbered 5606, 5607, 5608, 5609, 5610, 5611 and 5612, each for the sum of $1000; that said bonds were delivered to said E. A. Burke, State Treasurer, whose duty it was to destroy the same; but, unmindful of his duty, he feloniously and corruptly converted same to his own use, and (the defendant) Hart, under his terms of agreement with said Burke, negotiated the same in the manner and form as above set forth."

The charge is then directly made that after December, 1885, and possibly after August, 1886, the defendant "procured to be altered

all of said bonds"—that is to say the consolidated bonds—"and coupons aforesaid, by adding to them the words : 'Interest reduced to two per centum per annum from January first, one thousand eight hundred and eighty, and four per centum per annum thereafter,' purporting and pretending that said bonds were of full force and effect, and valid—making said alteration an essential change, with intent to deceive, and to give to said bonds an apparent validity, and to make them negotiable upon the market, and to collect the interest on said coupons."

It is further averred that Burke, treasurer, did draw, by check, out of the public moneys of the State on deposit with the fiscal agent, the State National Bank, the sum of $30,760, purporting to be in payment of coupons numbered 13, 14, 15, 16, 17 and 18, without specifying the particular bonds either by class or number. "That said checks were drawn to the order of M. J. Hart and Lawrence Conroy, but were all *used* for account of said Hart, and placed to his credit, and by him checked out in payment of his and the said Burke's private or personal matters."

Then follows a list or schedule of said checks, viz.:

"October 17, 1882, to M. J. Hart, for $1040.
"October 17, 1882, to M. J. Hart, for $1040.
"May 23, 1883, to Conroy, for $2500.
"May 23, 1883, to L. Conroy, for $2500.
"May 26, 1883, to M. J. Hart, for $2000.
"May 26, 1883, to M. J. Hart, for $2000.
"September 28, 1883, to L. Conroy, for $2000.
"September 28, 1883, to L. Conroy, for $2000.
"July 3, 1883, to L. Conroy, for $6000.
"July 3, 1883, to L. Conroy, for $2000.
"April 10, 1884, to L. Conroy, for $2720.
"April 15, 1884, to L. Conroy, for $2960."

Then follows the averment that no consideration was given by said Hart for said funds; that said checks were false and fraudulent in their collection and appropriation, and the sums thereof should be refunded to the State.

That Hart well knew he was not entitled to the same, or to collect the same; and that the money was paid in error by the fiscal agent of the State.

In conclusion, the general allegation is made that Hart was possessed of full knowledge of the said transactions, and that in their arrangement and consummation a conspiracy existed between them —Hart and Burke—to defraud the State, and to use for their own personal gain the said securities and moneys, against good conscience and morals, and to the great injury and detriment of the State. Therefore the defendant is indebted to the State for the sums set forth in the sum of $30,760, illegally collected from the State treasury, on the checks of Burke, Treasurer.

But, in order to bring the discussion of the issues of the case within narrower limits, it will be necessary to paraphrase the allegations of the petition; and, by so doing, we find them to be of the following purport, viz.:

First—That the Agricultural and Mechanical College, and Seminary bonds were held by the Treasurer in trust, and were actually in his physical custody and possession during the years 1879 to 1888, inclusive, and during which period of time same were by the Constitution declared void, and the General Assembly directed and required to destroy them.

Second—That the Treasurer having official custody of said bonds, unlawfully and fraudulently embezzled same, and converted them to his own use; and that the defendant was interested with said Treasurer in the aforesaid illegal conversion of said bonds, and dealt in same by pledge, negotiation, sale and exchange, and is the present holder of a large number of same.

Third—That in the course of his negotiations, the defendant, not only personally superintended same as a broker, but acted through other brokers and agents and obtained money on said illegal bonds to the extent of $110,000—enumerating various transactions as having occurred between the dates February 17, 1882, and December, 1885.

Fourth—That matured interest coupons were attached to *all* of the aforesaid bonds from date July 1, 1880, with the exception of bonds numbered 809, 821, 823, 843, 844, 853, 884 and 889, "from which the *defendant* had clipped the coupons up to and inclusive of No. 20, due January, 1884."

Fifth—That *Burke, Treasurer*, had in his possession coupons of 105 of said bonds, part of which he collected in August, 1881, through

his agent, Cockerton, through the State National Bank—same being the seventy-seven bonds above enumerated.

Sixth—That in addition to the foregoing, there were coupons on the forty-four $500 bonds which are enumerated also—being those alleged to be in the possession of Burke.

Seventh—That the amount claimed of defendant, on the score of interest thus collected, aggregates $2564.

I.

First in order comes the check transactions, it being a claim made of the defendant for $30,760, for this, to-wit: that Burke, Treasurer, issued certain checks purporting to have been in payment of interest coupons on consolidated bonds, that were, in fact, never surrendered—that is to say, checks that were issued without consideration, and made payable to the defendant, or to his agent, and in this way same were unduly collected from the fiscal agent of the State in error.

It is alleged that the aggregate amount thus drawn purported to have been in payment of coupons numbered respectively 13, 14, 15, 16, 17 and 18, *though the particular bonds to which said coupons belonged were not enumerated.* But it is alleged that all of the sums collected were received and used by the defendant, being placed to his credit and by him checked out of bank in payment of his and Burke's private or personal matters.

There are twelve checks in number, and they embrace the dates October 17, 1882, and April 15, 1884—four of them, aggregating $6080, being alleged to have been made payable to the order of defendant, and the remaining eight, representing $24,680, alleged to have been made payable to the order of L. Conroy—who was defendant's agent for certain purposes.

The theory upon which the plaintiff proposes to hold the defendant is, that Burke, Treasurer, having official custody of the consolidated bonds, unlawfully and feloniously embezzled same and converted them to his own use; that he issued the aforesaid checks, as in payment of certain interest coupons, which, in point of fact, he did not surrender; and that the defendant, being interested with said Burke in said illegal conversion, and the collection and appropriation of the money collected, for his own and Burke's private account, was responsible therefor.

The judge *a quo* accepted this theory, and charged the jury accordingly, the portion of his charge which is applicable to this question being to the effect that if the jury find from the evidence that the State had paid interest on coupons, then it was their duty "to find from the evidence whether or not the *defendant has received such interest on the checks of the State;*" if so, then it was their duty to find a verdict "for the *amount of interest received by the defendant*, and *for the amount of coupons so collected.* For the State, under the law, having received no consideration for the money so paid to the defendant, it must be returned by the defendant to the State, same having been paid in error, and the defendant having no legal right to collect or receive the same."

He charged the jury further that if they should "find from the evidence that *defendant did not receive said interest, or any portion thereof*, (their) verdict must be *for the defendant, rejecting the plaintiff's demand for $30,760, the amount of said interest claimed to have been paid on the checks of the State.*"

No objection was urged by plaintiff's counsel to this charge, and we must presume that it was perfectly satisfactory.

We are, therefore, to ascertain whether the defendant was interested with Burke in the aforesaid illicit transactions; or, if he was not, whether he received money from the State, on the payment of coupons, through the medium of the Treasurer's checks unlawfully issued.

Now, while it is true that with reference to the sums that were by Burke checked out of the treasury, there are no particular bonds designated, yet taking the list of checks that is furnished and *their dates*, and it is evident that all the transactions represented by them occurred between the 17th of October, 1882, and April 15, 1884, and during the lifetime of L. Conroy.

Recurring to the dates specified in the petition as those on which the defendant was engaged in bond transactions, and it will be seen that same began on the 14th of February, 1882, by a pledge of $53,000 bonds to the Germania National Bank; and that the subsequent transactions occurred on the 8th of March, 1882; on the 10th of May, 1882; on the 12th of May, 1882; the 24th of July, 1882; on the 19th of September, 1882; on the 10th of October, 1882; on the 2d of November, 1882; on the 10th of July, 1884; on the 27th of October, 1885, and on the 28th of December, 1885. Comparing

dates, and it appears that only one of the transactions which are detailed in the petition is alleged to have taken place within the period when those checks were issued; and the averment of the petition is that the transaction of that date was a loan, which the defendant secured from the New Orleans National Bank, of $5000, on a pledge of $18,000 of bonds, which had been previously pledged to the Germania National Bank, on the 24th of July, 1882, prior to the issuance of the first of said series of checks.

It further appears that the check transactions occurred *antecedent* to the date of defendant's pledge of $54,000 of bonds to Henry Bier, on the 28th of December, 1885, from which it is alleged that the *defendant had cut the coupons* up to and inclusive of coupon No. 20, due January, 1884; and likewise *antecedent* to the date of defendant's pledge to the Germania National Bank, of $109,700 of bonds, in February, 1886; and, also, *antecedent* to his pledge to the Mutual National Bank of $100,000 of bonds on the 1st of April, 1887.

It further appears from the allegations of the petition that in all the various bond transactions of the defendant, prior to the 1st of September, 1888, he acted as *broker* or *agent* in negotiating *pledges* of bonds; and that it was *subsequent* to that date that he acted in the capacity of *owner* of any of said bonds, or made *sales* of them in market.

Hence it is from this standpoint that we are to view the defendant's liability for restitution of interest that is alleged to have been unduly collected from the State.

It is in proof that the defendant was absent habitually during the years 1883 and 1884, in New York, and was only in New Orleans for a few days at a time, and that most of the transactions that occurred in those years were negotiated through L. Conroy.

One witness states that he received two checks of $2000 each, from L. Conroy, on September 29, 1883, and credited same to the account of Hart and Conroy, though the account was, ordinarily, kept in the name of Conroy alone. He says: "I *presumed* it was Hart and Conroy, since Mr. Hart was always telling me that Mr. Conroy was a *partner with him in the city time business.*"

He then makes this explanation, viz.:

"That simply shows that, on September 29, 1883, I received two checks of $2000 each, and they were credited to the account of L.

Conroy. I can tell no more about it. I don't know what it was for, or anything; I simply know it is credited to his account."

He further states that on July 3 he finds another entry on his cash book: "L. Conroy, $2000."

That he knows "nothing further than that he received the checks but does not know to whose order the checks were made payable. His books do not show to whom they were drawn, and he knows nothing beyond what his books show."

The defendant, as a witness, states that L. Conroy had charge of *his city time business*, for a portion of the profits during the years 1883 and 1884.

That the money represented by the different checks was paid by Major Burke to Mr. Conroy, for the *accrued interest on his different loans.*

Major Burke informed witness that he had given Mr. Conroy the coupons to cover that, and asked me to give the checks to Conroy. I found afterward that Conroy had drawn a check for a like amount on "May 31, 1883, $4000." "Mr. Burke," states the witness, "said that he did not like to draw the checks to his own order, being State Treasurer."

"*They were coupons,*" *he said*, "*he had got from the bonds that he had been carrying* for different parties—I mean to say that *other parties were carrying for him.*"

Q. "Did Major Burke tell you who held the coupons?"

A. "He told me that Mr. Conroy held the coupons. I asked Mr. Conroy about it and he verified the statement."

Q. "Conroy held the coupons and he got the checks?"

A. "Yes, sir."

Q. "Are these the only two checks you received in person?"

A. "That is all."

He says there is no record in his books—those kept by Conroy—of the two checks of September 28, 1883, for $2000 each, ever having been deposited. Finds no record of check dated July 3, 1883, for $2000, and one for $6000 payable to L. Conroy—no record of these checks having gone into the business.

He then refers to a check for $2960 which was deposited, but it was payable to the order of W. B. Stansberry, and bears date April 16, 1884. It is evident that this check is not embraced within the calls of the plaintiff's petition, and need not be taken into account in argument.

This witness distinctly and emphatically states that he "never received any coupons, nor delivered any to Major Burke for which he gave a check. Never cut off interest coupons and collected them.'

Under this state of facts—and a critical examination of the entire record shows no other—it is difficult to resist the impression that this demand of the plaintiff's petition is not made out.

The judge *a quo* charged the jury "that the burden of proof is upon the State to prove the allegations contained in her petition," and that "the proof offered must be sufficient to enable them * * * to grant the relief prayed for."

He charged the jury further, that if they should "find from the evidence that L. Conroy was the agent of defendant, or did business for him in his own name, *then the defendant is only bound by the acts of Conroy while acting within the scope and in the course of said business.*"

This is unquestionably the law, and the plaintiff's counsel did not demur to the charge.

It appears evident that whatever agency Conroy had in reference to the checks in question it did not come within the scope of his employment or defendant's responsibility, and consequently he incurred no liability to the State on that score.

There is certainly no evidence to show that the checks were issued in payment of coupons or fraudulent bonds, and particularly in payment of coupons numbered 13, 14, 15, 16, 17 and 18 as charged, though it is clearly shown that they were actually given in payment of coupons, and consequently for a consideration.

II.

The second demand of the petition is that for $24,300 as the amount of interest that *defendant* is alleged to have *collected*, or which was collected through his *procurement* on illegal bonds.

First enumerating in detail the various bond transactions of the defendant with different persons between the 17th of February, 1882, and December 28, 1885, the petition alleges that "to all of said bonds were attached interest coupons, due from July, 1880, with the exception of bonds numbered 809, 821, 823, 844, 853, 884 and 889, *from which said defendant had cut the coupons up to and including coupon No. 20, due January, 1884.*"

And it further alleges that in pursuance of his "agreement, and in consideration of his interest in said transactions with said Burke, defendant did compound by way of account with said Burke as to all of said bonds, and it is true that said Burke did have in his possession coupons of 105 of said bonds, part of which, in August, 1881, he, through his agent, one Cockerton, collected from the State"—enumerating them by numbers.

There are no other bonds that are indicated by numbers as those from which coupons were clipped by Burke or the defendant and collected from the State, but there are general averments which are sufficiently comprehensive to cover the residue of this particular demand.

We have made a painstaking examination of the record in the vain endeavor to ascertain the proof upon which the jury rested their verdict in favor of the State on this demand.

The proof does not disclose that the defendant personally, or through any agent of his, made any collection of interest coupons while the bonds were in his possession. While the proof does show that the defendant did have many and large transactions in State bonds, aggregating hundreds of thousands of dollars—and many of such dealings with Major Burke—it does not show the number of *illegal* bonds that passed through his hands, and hence it is a matter of impossibility to trace the various coupons on such illegal bonds. State bonds were marketable, and were daily bought and sold on change without suspicion or doubt, and the defendant testifies that he was not aware of any doubt of the legality of the bonds he dealt in until the bond *exposé* of 1889.

It is evident that the judge *a quo* understood the success of plaintiff's case to depend upon proof of a combination or conspiracy between the defendant and Major Burke, as his charge to the jury on that question will attest, for it says: "If you find from the evidence that Burke, State Treasurer, wrongfully converted said bonds to his own use, *and that the defendant was interested with him in said wrongful and illegal conversion, and assisted said Burke in negotiating said bonds, and in collecting the interest thereon. * * * And that the State paid interest thereon from January, 1880, to July 1, 1889, then your verdict must be for the plaintiff for $24,300 interest on said bonds,* or whatever portion thereof the evidence before you shows that the State has paid."

And "if you find from the evidence that the *defendant was not interested* with said Burke in said wrongful and illegal conversion, and did not assist Burke, as stated above, *then your verdict must be for the defendant* on the claim *for interest made by the State* for $24,800, on $100,000 State bonds."

This portion of the charge appeared to have been acceptable to the plaintiff's counsel, as he failed to except thereto or reserve objection.

Quite a number of brokers and bank officials were interrogated with regard to the defendant's transactions in State bonds, without any circumstance being elicited *tending* to show the existence of such a conspiracy—though it did elicit the fact that there were many of the illegal bonds that figured in those dealings.

One witness who was on particularly intimate business relations with the defendant speaks of one lot of 180 coupons—detached coupons, which represented $1800—which he is confident of having received from the defendant or some one of his employés or agents. But he afterward qualified this statement by saying that he "could not say that they were all handed to him by Mr. Hart, but there were *some* of them that certainly were." He could not say "that they all were, because there were several different amounts of them."

This, however, the defendant positively denies. The present Treasurer states "that there is in his office no means of telling where any of the illegal payments of interest were made. Nothing to show upon what date any of the illegal payments of interest were made."

The Auditor states that his office had nothing to do with the coupons, and he could not tell whether the Treasurer paid out money in payment of interest coupons prior to 1888 or not.

A confidential agent of Major Burke was interrogated on the part of the State, and while he admitted that he handled a large number of bonds for him—over $200,000—by negotiating and borrowing money on them for Major Burke, and some from the defendant, yet he states nothing tending to show any *conspiracy*, or *interest* in these dealings on the part of the defendant. He says "there were many and large transactions between Major Burke and Mr. Hart, with which he was familiar. These transactions were conducted through Conroy, and checks passed both ways."

A clerk in the office of Major Burke during the time he was Treasurer—a gentleman who was evidently upon close business as well as

friendly relations with him—was interrogated by the State, and he was asked this question:

Q. "Did you ever have any conversation with Mr. Hart, at any time, in relation to bonds?"

A. "Not in relation to any bonds or coupons, or anything of the kind. I met him occasionally. We have always been friends."

Q. "Did you ever have any conversation with him about the checks?"

A. "No, sir; I never mentioned to him anything in regard to the checks."

This witness states that from 1882 to 1888 he had almost exclusive control of the Treasurer's office, because Major Burke was frequently absent.

After a close investigation of the record, we are unable to agree with the conclusions of the jury on the demand under consideration. There is certainly no evidence of any conspiracy between the defendant and Burke, and there is nothing to show, with any degree of certainty, the amount of interest Burke collected from the State. The State has evidently failed to discharge the burden of proof that the law imposes upon every plaintiff, to make out a claim against the defendant with reasonable certainty. Failing in this she is not entitled to judgment on this score.

III.

On the last proposition of the plaintiff, that the defendant must surrender the bonds enumerated as being in his possession, there is neither much evidence to consider or argument to make.

Accepting the doctrine that is announced in Pugh vs. Moore, Hyams & Co., 44 An. 209—and to which this court stands thoroughly committed—in reference to the illegality of the consolidated bonds in question, and treating them for the purposes of the argument as absolutely and inherently null and void, on what theory is the defendant to be held to surrender them under a judgment of this court?

The bonds claimed are described in detail by their respective numbers, and the verdict of the jury was in favor of the State commanding the surrender of those described, less certain exceptions already enumerated; and judgment was rendered accordingly—sustaining the writ of sequestration.

The writ of sequestration does not appear in the record, nor the sheriff's return showing his action in the premises, notwithstanding an order was made for the issuance of the writ.

Referring to the defendant's answer we find the following admission, to-wit:

That the defendant was, at the time of the institution of the suit, in possession of twelve bonds of $1000 each, and forty-one of $500 each, aggregating $32,500—of the denomination called consolidated qonds; but said bonds "had, long prior to the institution of this suit, been, by defendant, pledged as security for debt due by him to persons residing outside of the State of Louisiana, who still hold same."

On this question there is but little testimony other than that of the defendant himself, and the substance of it is as follows:

That he acquired the $32,500 of bonds mentioned from Major Burke as pledges for money loaned on them; but at the time he had no knowledge of their illegality, and no reason to suspect their validity; but that said bonds are not in his possession.

Q. "And you gave the consideration which you have already mentioned to him for them?"

A. "Yes, sir."

Q. "Burke pledged those bonds to you?"

A. "Yes, sir."

Q. "And you have held them in pledge since?"

A. "Yes, sir."

Q. "Before the institution of this suit, what had you done with these bonds Mr. Hart? Where were they at the time this suit was filed—say on the 25th of February, 1890?"

A. "I pledged the bonds, sir."

Q. "They were in this State, at the time, were they?"

A. "No, sir."

Q. "Were they here at the time of the *exposé* of Burke, say in September, 1889?"

A. "Yes, sir."

Q. "How long did they remain here after that?"

A. "Oh! some time."

Q. "Well, about?"

A. "I think that I had given them to the party about a month previous to this suit, to the best of my recollection."

Q. "A month previous to the institution of this suit?"

A. "Yes, sir."

On the trial the judge *a quo* charged the jury on this question as follows, viz.:

"If you find from the evidence that Burke pledged to the defendant bonds not belonging to him, and that defendant gave Burke money therefor, and holds said bonds under said pledge, or that the defendant after being informed that said bonds were invalid pledged them to other persons, then I charge you that these facts are no defence to the State's suit for the bonds, and your verdict must be on the bonds for the plaintiff."

This part of the charge does not come within the scope and provisions of the defendant's exception, and consequently it may be considered satisfactory; and, as it is a fact admitted by defendant, that he repledged the bonds to parties residing outside of the State, after it had become known that they were illegal and fraudulent, such pledge is no defence to the action of the State—on the theory of the case of Pugh vs. Moore, Hyams & Co., 44 An. 209, and Herwig vs. Richardson & May, 44 An. 703. See, also, State of Louisiana vs. M. J. Hart, No. 10,652, just decided.

While it is true that these bonds are not actually in possession of the defendant, technically they are—same having been pledged only, and may be recalled at any time the debt is paid.

Under these circumstances this court, in the exercise of its equity powers, may decree the right of the State to have and recover said bonds from the defendant, and to declare them absolutely null and void in his hands, or that of any present or future holder thereof.

On the admissions of the defendant in his answer, the judgment should be so amended as to make it correspond, in respect to the numbers and amounts of the bonds, with the allegations of the petition; and it should be further altered and amended so as to reject and disallow the plaintiff's money demands.

The judge *a quo* charged the jury that they must not entertain, in any manner, defendant's reconventional demand, stating that although it is styled a reconventional demand, it is a claim and suit against the State of Louisiana, and the State can not be sued directly or indirectly in her own courts without legislative permission.

Of a similar reconventional demand we had occasion to express the following opinion in the case of State vs. Hart, No. 10,652, just decided, to-wit:

"In so far as the defendant's reconventional demand is concerned, little need be said, for the reason that it merely alleges the legality and binding force of the bonds in his hands, as obligations of the State. And, inasmuch as, in the course of our opinion on the merits of the principal demand, we were necessitated to pass upon the *primary validity* of the bonds, there is nothing left in the reconventional demand to decide—we therefore pretermit any expression of opinion on the question of law raised with regard to the jurisdiction and authority of this court to render a judgment against the State." To that opinion we adhere.

It is therefore ordered, adjudged and decreed that the judgment appealed from be so amended as to make the numbers, amounts and description of the bonds to be surrendered to correspond with the averments of the petition; and further amended so as to reject and disallow the demand of the plaintiff for the restitution of interest collected; and, as thus amended, the judgment is affirmed with costs of appeal taxed against the plaintiff and appellee.

Mr. Justice Parlange, not being a member of this court at the time of the argument and submission of this cause, takes no part in the decision.

Mr. Justice McEnery, absent (sick).

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No. 11,250.

Interdiction of B. Onorato.

The adjudication of property at a judicial sale is itself a complete title, which can not be divested, unless the purchaser refuses to comply with the terms.

The purchaser having complied with his bid by paying the price, the delay to execute an act of sale did not have the effect of annulling the adjudication, nor did it in any respect affect the rights of the owner.

The person interdicted is like the minor, who is under a tutor. The administration of his estate is governed by similar rules.

The curator paid debts of the interdict; incurred for him.

They were paid after the death of the interdict and after the curator's functions had expired.

The payment of debts manifestly due remains unaffected, for it would serve no useful purpose to cancel them and require payment of these amounts by the curator, to the executor of the interdict's succession, in order that he, the executor, may pay them to the creditors.

The amounts being due, the only difference would be payment by the executor instead of payment by the curator.

When payments exonerate the estate from legal charges the executor must show that they are unfounded and excessive, or they will be allowed as a credit on the curator's account.

The executor opposes certain items of the curator's account that are not proven.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

C. F. Buck and *Max Dinkelspiel* for the Executor, Appellant.

E. Howard McCaleb for Peoples' Bank of New Orleans, Appellee.

Guy M. Hornor for the Curator, Appellee.

The opinion of the court was delivered by

BREAUX, J. B. Onorato was interdicted. Joseph L. Onorato was his curator.

After his interdiction, and, in due proceeding, the sale of property was ordered to pay debts.

Under these proceedings the People's Bank became adjudicatee of certain real estate, on the 14th day of November, 1891, for the price of $21,000.

There were mortgages preceding, in rank, the mortgage of the bank. They were paid by the adjudicatee, the amount of its own claim was deducted, and the remainder, $1483.23 in cash, was paid to the auctioneer.

On a rule issued upon the motion of the attorneys of the interdict, the court ordered the recorder of mortgages to cancel and erase the mortgages on the property sold, and referred the mortgagees for payment to the proceeds of the sale of the property.

This adjudication transferred the property to the purchaser. C. P. 690.

His title under the adjudication is indefeasible, unless he refuses to comply with the terms of the sale. Washburn vs. Green, 13 An. 332.

The purchaser had complied with the terms of the sale.

The notarial deed of sale was signed after the death of the interdict.

The executor of his will moved for a rule on the adjudicatee, the People's Bank, in which he alleged that the property had been adjudicated to that bank, and that the adjudication had not been complied with; that he had offered to sign a deed and receive the price.

Concluding, he asked that the adjudicatee show cause why it should not comply with the adjudication and pay the price to the mover, or in default, for cancellation of the adjudication.

After the sale had been complied with by the adjudicatee, the interdict being dead, the executor took a rule on the curator for an account and delivery of the property to him.

The curator filed an account.

The executor filed an opposition on the ground that the account should have been rendered to him; that the authority of the curator ends with the death of the interdict, and that he has no power after that time to do anything but render his account.

That the sale of the property adjudicated to the People's Bank has never been passed, and that he alone has the authority to distribute the proceeds of that sale.

The opponent opposes all the other items of the account and demands proof in support of each.

Recurring to the adjudication to the bank, the proof is unquestioned that the property was adjudicated as alleged. This adjudication conveys title without any subsequent deed. Lane vs. Cameron, 36 An. 778.

In the case cited by appellant of Collins vs. Demorest, 45 An. p. 108, there was not a completed adjudication and specific compliance with the terms of sale on the part of the adjudicatee, as was done in the case at bar.

On this branch of the case, the District Court rightly and tersely says:

"As to all the proceeds realized, except $1483.23, distribution had been made prior to the interdict's death; all the mortgages, in their order according to their rank, being paid in the execution and completion of that sale itself.

"The late curator's account only recites this fact and states the amount that had thus been paid. He has not distributed, nor is he seeking to distribute. The order of sale was to pay these very mortgage debts. By order anteceding the sale, the mortgagees and

claimants were referred to the proceeds of the sale when made, that inscriptions might be erased and the title pass free to the purchaser. At the sale the People's Bank bid and paid, as herein above recited, and so of the other purchaser at the other sale.

"Ranking claims were paid in cash, the compensation did its work, authorizing retention *pro tanto*, and the remaining surplus was paid over to the curator's hands, all before the interdict's death."

The curator's account of the proceeds of sale is correct, and therefore the opposition against this adjudication was not well taken.

The account of the curator was due to the court. Succession of Webre, 36 An. 313.

The mode of rendering the account is similar to that followed by the tutor in rendering an account to his ward. C. C. 415.

That mode has been followed in this case. He accounts to the court and through the court to the executor.

The remaining grounds for decision are that the distribution of the proceeds could not legally be made by the curator, but only by the opponent as executor.

The interdict died on April 25, 1892, and opponent, Hart, became executor of the succession.

Regarding the executor and the adjudication to the People's Bank we agree with the court *a qua* in the statement, and further quote from its decision, that "it may not amount to a full estoppel, but it goes far in that direction, that the gentleman who, as executor, took the rule on the bank was the gentleman who, as representative of the ranking special mortgages, received, before the interdict's death, from said bank, as purchaser and adjudicatee, at said auction sale, $13,630.20 of the total price bid and paid, say $21,000. I take it, that he has, as executor, taken this rule as a matter of precaution for his own security in his said trust, which is proper."

Passing from the adjudication of the property of the interdict to the other grounds of opposition:

The records do not disclose any attempt at unfairness on the part of the curator.

The payment of certain debts contracted by him during the existence of the interdict, after the death of his principal, will not meet with approval nor commend itself as proper in settling the affairs of which he had charge under the appointment of the court.

As a practical question, in the present case, it would not serve any useful purpose to have these payments recalled in order that they may be carried in the account of another administration.

It is not alleged that the heirs or the creditors are affected by the mode of settlement followed.

The argument of the opponent is that the curator's authority ceased at the death of the interdict, and that it was then his duty to pay over to the executor amounts in his hands.

Technically the executor represented the succession, and should have delivered the funds as contended.

This alone does not offer sufficient grounds to set aside these payments.

But they must be proven correct by him, and in the event of his failure he becomes responsible.

This is the penalty to which he has exposed himself.

It is in place to state that none of the debts paid by him were contracted after the death of the interdict.

The judge of the first instance has approved the account as presented by the curator.

This court has decided that the acknowledgment and payment of debts by tutors and curators which they knew to be owing by the estate which they administer are *prima facie* evidence of their correctness. Kilgour vs. Ratcliff's Heirs, 2 Mart. N. S. 298; Baillis vs. Wilson, 6 Mart. N. S. 335; Succession of Franklin, 3 R. 287.

An appearance of good faith and good management in the settlement of accounts are important considerations, and relieve to some extent from the necessity of having witnesses to the various transactions.

The accountant thus protected is not obliged to prove the signature of every receipt for needful expenses and debts paid.

Proof of every item, however small and correct, from the mere statement, would involve the estate in heavy and useless expense. Succession of Bauman, 30 An. 1138.

Applying this rule in proving up the curator's account in this case, the judgment appealed from is affirmed as to all the items, except the following:

The item of $436.55 carried on the account as "amount paid by J. A. Newsham, gardener, for preserving property."

This item, to the curator's credit, may be correct.

The executor opposes it, on the ground that it is not supported by any evidence.

The item for attorney's fee, $1820, is equally unsupported by evi dence.

The entry on the account is all that appears in support.

Being opposed they should be proven up contradictorily with the executor.

The curator credits himself with $660.93, his own commission as executor.

It is stated in the account that it is 2 1-2 per cent. commission on the amount of the inventory.

No commission is charged upon the revenues. The claim for this commission will not be passed upon at this time.

Before passing upon it, it is proper to ascertain whether there was any productive property forming part of the estate.

Any right to recover the three items just mentioned is reserved.

It is therefore ordered, adjudged and decreed that the judgment appealed from be affirmed in all respects except in so far as relates to the items carried in the account as having been paid by Newsham, viz.: $436,55; attorney's fees, $1820; curator's commissions, $660.93. As to these three items the case is remanded for a new trial.

Appellee to pay costs of appeal.

No. 11,321.

STATE OF LOUISIANA EX REL. MRS. PENELOPE A. VIOLETT ET AL. VS. FREDERICK D. KING, JUDGE OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

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1. Where an injunction does not order the closing up of defendant's business but restrains him simply from carrying it on in a manner resulting in an alleged continuing nuisance to the health and comfort of plaintiff and his family, it should not be set aside on bond, as the effect of the dissolution is to authorize and permit the defendant to continue to do the act complained of and restrained during the pendency of the suit.

2. The law does not limit its protection to parties who are aggrieved in dollars and cents by a continuing nuisance. The fact that the plaintiff in injunction does not own the premises which he occupies, but occupies them as tenant does not withdraw from him and his family the protection of the law against a nuisance affecting their health and comfort.

3. The failure of the owner of the property who has joined with the tenant in an application for an injunction to perfect the injunction by giving bond does not destroy the right of the tenant, who is before the court standing on his own rights, and not depending upon those of the owner, to the benefit of the injunction, when he has himself given bond.

APPLICATION for *Mandamus*.

Farrar, Jonas & Kruttschnitt for the Relators.

Respondent *in propria persona*.

The opinion of the court was delivered by

NICHOLLS, C. J. The relators are Mrs. Penelope A. Violett, widow of the late William A. Violett, and Atwood Violett.

They allege that they instituted suit in the Civil District Court for the parish of Orleans, in which suit they represented that relator, Mrs. Violett, was the owner, and relator, Atwood Violett, the occupant of certain premises in their petition described, and that F. Johnson & Son, a commercial firm domiciled in the city of New Orleans, and the individual members thereof, had established a livery stable adjoining the property in said petition described, in which livery stable they kept a large number of horses; that from said livery stable arose the most offensive smells, and that the same caused swarms of insects to infest the premises belonging to said Mrs. Violett and occupied by Atwood Violett, and that said smells were so offensive and disgusting as to subject relator, Atwood Violett, the occupant of said premises, to the most intolerable annoyance; that in said petition relators further represented that said livery stable so located in the vicinity of said dwelling house as aforesaid, as also of other dwelling houses, and in a neighborhood of dwelling houses, and the business of conducting said livery stable at said location in the manner in which it was conducted constituted a nuisance which relators were entitled to have suppressed, and praying for an injunction in the premises. That upon said petition an order was duly entered ordering an injunction to issue in the premises as by relators prayed for. That said injunction duly issued; that the defendants therein subsequently took a rule upon relators

to show cause why said injunction should not be dissolved upon bond; that said rule was, after hearing, made absolute by the Civil District Court, and defendants allowed to bond said injunction, all of which, with other necessary particulars, it was averred would more fully appear from the record of said suit now pending in the Civil District Court, which is referred to as part of their petition, and which in the original or duly certified copy thereof would be presented to the Supreme Court at the hearing. That the injunction prayed for was not against the conducting of said livery stable, provided the same be conducted in such a manner as not to inflict a nuisance upon relators, but merely enjoined said defendants from continuing to conduct said livery stable in the manner and form in which they did conduct the same—that is to say, in such a manner as to give rise to the most offensive and disgusting smells, rendering the dwelling house of relators untenantable. That by said order to bond an irreparable injury was and is inflicted upon relators, and they did seasonably apply to the court for a suspensive appeal from said order, but that the court, through Frederick D. King (the judge of Division "B," thereof, sitting in lieu of the Hon. George H. Theard, judge of Division "E" thereof, absent on leave, and to which Division "E" said cause had been allotted), who tried said rule and to whom said application for an appeal was made, has wrongfully refused and declined to render an order of appeal in the premises. They prayed for the issuing of an alternative writ of *mandamus* to the judge of Division "B," sitting in place of the judge of Division "E," commanding him to grant relators a suspensive appeal [*nunc pro tunc* as of date of August 4, 1898—date when application was made therefor] from the order allowing the dissolution of the injunction on bond.

An alternative writ of *mandamus*, having issued, the district judge has filed an answer in which he declares that on the trial of the rule to bond the injunction it appeared that no irreparable injury resulted or could result from the act complained of, and that the damage complained of could be made good or repaired by the payment of money. That it appeared said premises of relator were leased and that the only loss that could result was a loss to the tenant appreciable in money. That the suit was brought jointly by Mrs. Penelope A. Violett as owner of the property and Atwood Violett as tenant of the property—that no injunction had been issued on behalf of Mrs. Pen-

elope Violett, the owner of the property, as no bond had been furnished, and the injunction issued was on behalf of the tenant of the property, and the dissolution of the writ was accordingly of the writ issued on behalf of the tenant. That the judgment dissolving the injunction was rendered in the exercise of the discretion vested in the court under Art. 307 of the Code of Practice. He prayed that the writ of *mandamus* be refused.

The application to bond contained no reasons for the same. It was a simple motion requesting "on motion of counsel for defendant that plaintiff show cause on the 24th July, 1893, why the injunction should not be dissolved on defendant's furnishing bond conditioned according to law."

The district judge, in making the rule absolute, declared that he did so for reasons orally assigned and considering the law applicable to the case. We presume the reasons referred to were the same as those assigned in the answer or return herein. On the the 20th July, 1893, defendant in injunction obtained a rule on plaintiff to show cause on the 24th July, 1893 (the same day on which the rule on the motion to bond was returnable), why the injunction issued should not be set aside on the grounds: (1) that the court was without jurisdiction *ratione materiæ;* (2) that even if the court had jurisdiction, the allegations contained in plaintiff's petition were untrue and not such as would authorize the issuance of the writ; (3) that the petition on which the injunction issued set forth no cause of action; (4) the bond is not good, valid, or sufficient.

The record does not show what action, if any, was taken in the matter of this last rule.

The fact stated by the judge in his answer, that an order dissolving an injunction on bond is granted by a district judge in the exercise of a judicial discretion expressly conferred upon him by law, does not withdraw that order absolutely from being made the subject of review by this court. When the district judge, on application made to him by a defendant in injunction, permits the bonding of the injunction, plaintiff has the legal right to apply for a suspensive appeal from the order to that effect. Should this be denied him, he has the undoubted right to have tested in this court, as is now being done by the relator in this case, the question whether the judge was warranted and justified in this refusal. On such an inquiry this court has necessarily to determine whether the judge's discretion, which only

extends legally to cases wherein the dissolution of the injunction would not work irreparable injury to the plaintiff, has been legally applied or not. If we find it has not we grant relief, otherwise relator takes nothing by his application to us. As has been said several times by this court, each case must stand or fall upon its own special facts and circumstances. White vs. Cazenave, 14 An. 57; Blanc vs. Murray, 36 An. 167.

For the purposes of our decision, we take as true the allegations of fact contained in the petition for injunction, confining ourselves to the restricted issue on the pleadings as to the correctness *vel non* of the judge's action in the matter of the refusal of the appeal, which carries with it the determination of the question whether the bonding of the particular case would or would not work irreparable injury to the plaintiff. If we could under any circumstances extend our inquiries to matters touching the injunction proper, the matters which we could consider would have to be very exceptional and radical in their character. This whole subject has been very fully discussed in the case of State *ex rel.* Puckette vs. Hicks, 39 An. 901, where a *mandamus* was asked by plaintiff in injunction to compel the defendant judge to grant a suspensive appeal from an order *dissolving a preliminary injunction*.

The court, referring to the fact that by Art. 307 of the Code of Practice courts which grant injunctions are authorized "in their discretion" to dissolve an injunction on bond, said that the discretion thus vested was limited by the article to cases where the act prohibited may not work an irreparable injury—that in the latter case they have no right or power to dissolve, and that an order dissolving on bond in such cases is itself an interlocutory judgment, which may cause irreparable injury, and is therefore appealable under Art. 566 of the Code of Practice, which provides that "one may appeal from all interlocutory judgments when such judgments may cause him an irreparable injury." It further said that where the judge refuses to grant an appeal from such an order the plaintiff might resort to the Supreme Court for a *mandamus* to compel him to do so—that on application for such *mandamus* the inquiry in that court was simply whether the act which is prohibited by the injunction and is unfettered by the dissolution is such as may cause to plaintiff an irreparable injury. If found to be such the *mandamus* is granted, if not so found it is denied—that in this inquiry the allegations of the plain-

tiff's petition are taken for true so far as the facts therein set forth are concerned—that by this is not meant that the court was to be concluded by mere allegations in the petition that the acts restrained will occasion irreparable injury; that such allegations are mere inferences and deductions from the acts and facts charged, the verity and soundness of which the Supreme Court could review (see Crescent City vs. Police Jury, 32 An. 1194, 1195, 1196). That it had to examine the facts charged, and the nature and character of the injury which might be inflicted by the acts complained of, and is thus to determine whether such injury might be irreparable *vel non*. The court then proceeded to say that it was difficult to lay down any precise rule as to what gives to an injury the quality of being irreparable, but that the general principle was that an injury the damage from which is merely in the nature of pecuniary loss and could be exactly and fully repaired by compensation in money is a reparable injury, for which a bond of sufficient amount and properly secured would afford all adequate indemnity. The court quoted approvingly from the case of Crescent City vs. Police Jury, 82 An. 1194, where on a former occasion it had said:

"There are many injuries which in the very nature of things can not be repaired by any money consideration, such for instance as result from acts which outrage the feelings and wound the sensibilities, or deprive us of objects of affection, or of things which, trivial in themselves, but of inestimable value by reason solely of being associated with some precious memory or touching incident of our lives. Or it may be that the maintenance of the writ was required to preserve to us our homes and to establish us in a state or condition which lost for the moment can never be recovered nor the loss atoned for by money. In this class of cases the injunction should be maintained because the injury from its dissolution would be irreparable."

This extract was quoted not as an exhaustive but as an illustrative statement of the kind of injuries which were to be considered irr - parable. The cases of Delacroix vs. Villeré, 11 An. 39; White vs. Casenave, 14 An. 57; Marion vs. Johnson, 22 An. 512; Boedicker vs. East, 24 An. 154; Sigur vs. Judge, 33 An. 133; Waterworks vs. Oser, 36 An. 918; and Knabe vs. Ferrot, 14 An. 847, were also cited as illustrations of the principles guiding this court on those matters. Each particular case (it was declared) would have to be considered on its own facts and circumstances and the relief determined thereby.

The court further said that it was impossible and eminently improper for it to enter into a discussion of the legality and propriety of the injunction itself, unless on the face of the papers it was perfectly manifest that the granting of the injunction was an abuse of the power of the court (see Crescent City vs. Police Jury, 32 An. 1196).

The court held the relator to be entitled to a suspensive appeal and made the provisional writ of *mandamus* which had issued to peremptory.

In the case at bar the injunction was not sought to restrain the defendants from carrying on their business as keepers of a livery stable, but only from doing so in the manner complained of, which it was claimed was resulting in the commission of a nuisance intolerable to the plaintiffs.

The fact that the particular plaintiff who perfected the injunction by giving bond does not own the premises which he occupies, but occupies it as a tenant, does not withdraw from him and his family the protection of the law against a nuisance affecting their health or their comfort. The law in this State does not limit its protection to parties who are aggrieved in dollars and cents by a continuing nuisance (Blanc vs. Murray, 36 An. 164). The right of the tenant as plaintiff in injunction is destroyed neither because of the joinder with him of the owner of the premises in the petition for an injunction, and her failure to give bond, nor by the fact that she joins him in this court as one of the relators herein. If the owner has failed to give bond she may have no standing in court and should be so adjudged, but the tenant is before us standing on his own rights and not depending on hers.

The effect of the dissolution in this case would be to authorize and permit the defendant in injunction to do the act complained of and restrained—in other words, defendants, through the judge's order, would not only be authorized to pursue and carry on their business as keepers of a livery stable, but to do so regardless of what are alleged to be plaintiff's legal rights. Had the injunction taken out had as its effect the entire closing up at once of defendant's establishment this case would have been presented to us in a very different aspect from that which it actually has. Under the pleadings plaintiff has a vital present interest in having defendant's business conducted in such a manner as would not result in a nuisance to him. The in-

junction would have no greater effect than that. If defendants' business should be properly and legally conducted, they would have nothing to fear from the injunction and therefore nothing to complain of as being irreparable in its injury to them. They could not reasonably ask the court to permit them to carry on their business improperly and illegally without restraint of any kind to the termination of this litigation.

It may be that the petition for injunction is not as specific in its details as it should have been, and that the injunction is more general than is desirable, (Patten vs. Marden, 14 Wisconsin, 473), but the defendants sought no modification from the court below. That the granting of the injunction may subject defendants to a liability to charges of contempt of court for alleged violation of the provisions may be true, but that consideration is very remote in the discussion of the matter before us. We can not assume that the plaintiff will seek to harass defendants by contempt proceedings, nor can we assume that such proceedings would work irreparable injury to them. The generality of the terms of the injunction could in such proceedings but work to their benefit and plaintiff's detriment.

In view of the fact that the petition for the injunction does not claim defendant's business to be *per se* a nuisance—does not claim that it was carried on in an unauthorized locality, does not pretend that the common council of New Orleans has enacted regulations in respect to it which defendants have violated, the district judge would unquestionably on a matter of contempt bear in mind that within reasonable limits the individual citizen has to submit to some annoyance and inconvenience from the legal exercise of the rights of others, and would only hold defendants responsible on strict proof of a clear disregard by the defendant in injunction of those obligations which Art. 666 C. C. declares "citizens owe to each other under the law, independently of all agreement." Wood on Nuisances, Sec. 498.

In Delacroix vs. Villere, 11 An. 40, the court, alluding to a number of cases where defendants in injunction had been permitted to bond the injunction, said that an examination of them would show that they were cases in which the injury was really appreciable in money and where the continuance of the injunction was likely to work a more serious injury to the other side. That there were some things that bonds would not cover and which could not be estimated in

dollars and cents, and if our law can not protect in cases like those it but poorly earned the encomiums bestowed upon it. In Blanc vs. Murray the court said: "In determining the question of nuisance *vel non* it is necessary to balance the rights of the parties in view of all the circumstances and say whether or not the use of the property in the manner complained of is reasonable and in accordance with the relative rights of the parties."

This remark was made after a trial on the merits, but the relative rights of parties as they appear *prima facie* in the pleadings are easily discoverable in this case.

The parties to this litigation do not stand before the court by any means with an equality of right. The plaintiff has everything to lose and the defendant nothing legally to gain by bonding the injunction.

It might well be asked (altering a little the words of Mr. Justice Egan, in his dissenting opinion in the case of State ex rel. Druillet vs. Judge, 29 An. 870), "who can recall or repair the effect of a continuing nuisance to the health and comfort of plaintiff and his family, and what is the effect of allowing a dissolution of the injunction in this case if it be not to permit defendants to continue and keep up the nuisance complained of during the pendency of the suit, however long."

We are of the opinion that the plaintiff was entitled to a continuance of the injunction until the hearing of the case on its merits and that the dissolving of the same on bond would work irreparable injury to the relator, Atwood Violett. He is entitled to the suspensive appeal for which he applied.

It is therefore ordered and decreed that the provisional writ of *mandamus* herein issued be and the same is hereby made peremptory in favor of the relator, Atwood Violett. Mrs. Penelope A. Violett not having perfected the injunction by bond in the lower court the *mandamus* asked for is as to her refused.

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No. 11,334.

CITY OF NEW ORLEANS VS. NEW ORLEANS COFFEE COMPANY, LIMITED.

Exemptions from taxation are strictly construed. A corporation claiming to own a secret non-patented process by which, without the use of any chemical, it is

enabled to make selections of green coffees which, through careful and cleanly roasting and a secret process of cooling, produce "brands" of unground roasted coffees, each one of which is claimed to have a recognizable taste—is not a "manufacturer" within the meaning of Art. 206 of the Constitution, and is not exempt under that article from the payment of a license.

APPEAL from the First City Court of New Orleans.
Childress, J.

Geo. W. Flynn, Assistant City Attorney, and *E. A. O'Sullivan*, City Attorney, for Plaintiff and Appellant.

Moise & Cahn for Defendant and Appellee.

The opinion of the court was delivered by

PARLANGE, J. The defendant corporation claims to be "a manufacturer of coffee," and to be as such exempt under Article 206 of the Constitution from the payment of a license.

The defendant corporation contends that by means of a secret non-patented process, it is enabled to make a selection of green coffees having the qualities required for the purpose intended, which coffees, after being subjected to manipulation, being roasted and being allowed to cool in a particular manner, produce certain brands of coffee, each having a recognizable taste and flavor.

The defendant corporation says and insists that no chemicals of any kind are used during the secret process, and it is upon the production of its different brands of roasted coffee that it relies to be held to be "a manufacturer of coffee."

We have considered the evidence and the pleadings with care, and we are satisfied that the defendant corporation does not claim that it is a manufacturer by reason of grinding coffee and thereby changing its form, and while some incidental statements to be found in the testimony might indicate that exceptionally the defendant corporation may grind the coffee which it manipulates, its claim to be a manufacturer of coffee is based wholly on the production of brands of unground roasted coffee.

These brands, as stated, are claimed to be the result as well as the object of the secret process above referred to, which process the defendant claims is valuable, $1000 having been offered for it.

Whatever this secret process may be, we are to decide whether the defendant corporation is a manufacturer, on the tangible results of the manipulation to which they subject green coffees, bearing in mind the assertion of the defendant corporation that it uses no chemicals, and that the coffee after the manipulation is still pure coffee.

The defendant corporation virtually admits that a "coffee roaster" is not a manufacturer, but denies that such a designation can properly be applied to it. A "coffee roaster" is testified by the witness for the defendant corporation to be a person "who takes a sack of coffee and simply puts it in a roaster and turns that coffee out after it is roasted."

Exemptions from taxation are strictly construed, the general rule being that every citizen must bear his share of the expenses of government. Is the defendant corporation a manufacturer? Admitting that it has a secret process for the selection of green coffees, the result of which is the production of "brands of coffee" suitable to different tastes and recognizable from each other, and admitting further its claims of careful and cleanly roasting and its other secret process of cooling the roasted coffee, is the result a manufactured article? We think not.

It is not every employment of labor which will make the thing upon which it is employed a manufacture. It has been held that the great and laborious pursuits of mining and ship building are not manufacturing occupations. In another order, this court has held that a maker of ice cream, even on a considerable scale, is not a manufacturer (New Orleans vs. Mannessier, 32 An. 1075). In that case this court said that the mammoth kitchen of a hotel is not a manufactory. Yet, the confectionery and the kitchen yield products in which the identity of the articles from which they are made is almost lost.

In the case of Hartranft vs. Wiegmann, 121 U. S. 609, the Supreme Court of the United States held that where the outer layer of shells was cleaned off by acid and the second layer was then ground off by an emery wheel, so as to expose the brilliant inner layer, the result was not a manufactured article.

We quote further from Hartranft vs. Wiegmann, as follows:

"We are of opinion that the shells in question here were not manufactured and were not manufactures of shells. * * *

They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the result a manufacture of wool. Cleaning and ginning cotton does not make the result a manufacture of cotton. In Schedule M of Sec. 2504, R. S., a duty of 30 per cent. *ad valorem* is imposed on 'coral, cut or manufactured;' and in Sec. 2505, 'coral, marine, unmanufactured,' is made exempt from duty. These provisions clearly imply that but for the special provision imposing the duty on cut coral it would not be regarded as a manufactured article, although labor was employed in cutting it. In Frazee vs. Moffitt, 20 Blatchford, 267, it was held that hay pressed in bales, ready for market, was not a manufactured article, though labor had been bestowed in cutting and drying the grass and baling the hay. In Lawrence vs. Allen, 7 How. 785, it was held that India-rubber shoes, made in Brazil, by simply allowing the sap of the India-rubber tree to harden upon a mould, were a manufactured article, because it was capable of use in that shape as a shoe, and had been put into a new form, capable of use and designed to be used in such new form. In United States vs. Potts, 5 Cranch, 284, round copper plates, turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper. In the case of United States vs. Wilson, 1 Hunt's Merchants' Magazine, Judge Betts held that marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but was free from duty, as being unmanufactured."

The evidence in the instant case and the spirit of the decisions cited satisfy us that the defendant corporation is not a manufacturer of coffee, as claimed by it, so as to entitle it to exemption from license under Art. 206 of the Constitution.

The Ernst case, 35 An. 746, relied on by the defendant corporation, is not applicable. To clean rice, a long and laborious process is required; a large and expensive plant, including powerful and complicated machinery, is necessary; and from the "paddy," several marketable by-products are obtained, besides the cleaned rice.

It is therefore ordered, adjudged and decreed that the judgment appealed from be and the same is hereby reversed, annulled and set aside, and that said defendant corporation pay to the plaintiff the sum of fifty dollars as a license due said plaintiff by said defendant for carrying on the business of wholesale dealers for the year 1898; and that said defendant further pay said plaintiff 2 per cent. per month interest on said amount from March 1, 1898, and all costs.

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No. 11,860.

MRS. SYLVANIE B. DENEGRE VS. DAVID MUSHET.

A motion to dismiss an appeal on the ground that the necessary parties have not been cited will be denied when all the parties to the record interested in maintaining the judgment are parties to the appeal.

In case property is sent to sale under a senior mortgage and there remains a surplus after the claim of the first mortgagee has been paid, the purchaser is entitled to retain it and pay it over to the subordinate mortgagees when they present themselves.

A creditor holding a judicial mortgage only has no claim to, or right upon this surplus, and is without right to call other creditors holding *special* mortgages into court for the purpose of discussing or distributing it. Much less has he the right to interplead in the original executory proceedings and compel the appearance of *special* mortgagees to try the *validity* of their demands with the purpose and object of having their nullity pronounced to the effect that his own be *advanced* to *first* in rank, and thus to be preferred in receiving payment.

Such a proceeding is not a *concursus*, but has the features of a revocatory action, and is amenable to the prescription of one year.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

W. S. Benedict and *Robt. G. Dugué* for Plaintiff in Rule, Appellee:

All claims to the proceeds of a judicial sale must be referred to the court under whose authority the money was realized to class the mortgages and privileges according to their rank, in a summary manner. R. S. 1942; C. P. 126.

The proceeding is a sort of concursus, where every creditor is plaintiff and defendant, the several claims being open to every objection of law and fact, such as minority, fraud, simulation, etc. 11 An. 386, 671; 40 An. 149.

The holder of a mortgage which is assailed by an opposing creditor must establish its validity.

When notes secured by mortgage, which have once been issued by the maker, return into his possession, the mortgage is extinguished by confusion and can not be revived by a subsequent reissue of the notes after maturity. 19 An. 260; 4 R. 416; 20 An. 264.

Guy M. Hornor for Defendant and Appellant:

Simulation must be specially alleged. Clarke vs. State Bank of Alabama, 8 An. 325; Spicer et al. vs. Lewis et al, 7 Martin, p. 221; Long vs. Klein, 35 An. 895; Chopin & Legendre vs. Blanc & Legendre, 25 An. 35.

The revocatory action is prescribed by the lapse of one year. Civil Code, 1967 and 1994; 31 An. 592; 24 An. 246; Conte vs. Cain, 33 An. 965; Morris vs. Cain, 39 An. 712 and 721.

" When an actual consideration, no matter how inadequate, has been paid by the purchaser in an alleged sale, the transaction is not a simulated one." Brown, Administratrix, vs. Brown, 30 An., p. 966; Renshaw vs. Dowty, 39 An., p. 608; Pochelu vs. Catonnet, 40 An. 827.

" A mortgage may be given for an obligation which has not yet arisen into existence." Civil Code, 3292; Morris vs. Cain, 39 An. 712 and 729; Brown vs. Pickersgill, 7 An. 297; Levy, Jr., vs. Ford, 41 An. 878; Gardner & Co. vs. Maxwell, 27 An. 561; D'Meja vs. Generes, 22 An. 286.

" It is not necessary that the mortgage should be given by the person contracting the principal obligation; it may be given for the contract of a third person." Civil Code, 3295, 3297, 3298; 1st An. 62; Elbert and Husband vs. Wallace & Co., 26 An. 706 and 707.

" A promise to the creditor to pay the debt of another is binding, and requires no consideration but the original debt." Railroad Co. vs. Chapman, 8 An. 97.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

BREAUX, J. The testamentary executor of the late Henry Shepherd, claiming a preference under a mortgage, sued out a rule for the cancellation of certain mortgages appearing of record as first in rank and specially alleged that certain taxes were claimed as privileges in favor of the city of New Orleans and of the State of Louisiana against the property seized, on which his mortgage bore; that these taxes, save those for the year 1892, were not due.

An order issued to the present appellant, to the State Tax Collector for the First District of New Orleans, to the recorder of mortgages and the civil sheriff, to show cause why the mortgages and taxes should not be erased and the mover paid from the proceeds of sale in the sheriff's hands, and it was further ordered that the sheriff in the meantime retain possession of the funds.

Service of the rule was made on the city of New Orleans, the State of Louisiana, and on W. A. Gordon, the appellant.

The sheriff and the recorder of mortgages were not notified.

After legal hearing judgment was pronounced ordering the erasure of the mortgages and the payment of the proceeds as prayed for.

William A. Gordon, one of the defendants in rule above, appeals.

In his petition for an appeal he prays that citation of appeal be served on the plaintiff in rule, and appellee and he alone has been cited to answer the appeal.

The appellee has moved to dismiss on the ground that the necessary parties have not been cited, and this through the fault of the appellant.

During the trial of the rule in the lower court it was proven that a considerable sum was due for taxes on the property seized.

The proposition that all parties to the record interested in maintaining the judgment must be made parties to the appeal, that all who are not appellants are appellees, and that all the appellees must be cited or the appeal will be dismissed, can not reasonably be controverted.

The question arising on the motion to dismiss relates exclusively to the interest of the Tax Collector and must be solved by reference to the possibility *vel non* of a decision on the merits affecting that interest in any manner.

It is well settled in jurisprudence that no appeal will be dismissed unless the appellee shows that he is clearly entitled to that relief.

The appellee on the trial below proved the amount of the taxes and showed that they had been paid.

Upon that evidence the court *a qua* ordered the sheriff to pay the taxes due.

It was a *pro forma* order, for they had already been paid.

The mover and appellee has acquiesced in the judgment appealed from in so far as relates to taxes.

The appellant has not contested their validity.

The claim for taxes, and their payment, does not present a single issue to be decided. That matter is at rest.

The State of Louisiana and the city of New Orleans in the matter of taxes have no interest in the success of the appellant or the appellee.

The sheriff was the holder of the funds, and was ordered to pay the taxes. He is not a party to these proceedings.

If the order to pay can be revoked at all it can be revoked only in proceedings contradictorily with him.

His action in paying raises no issue.

All parties acquiesce in the payment as made by him.

The State and city of New Orleans are not placed under the neces-

sity of proving the correctness of the judgment in accordance with which payment was made.

The motion therefore fails.

Mr. Justice Parlange takes no part.

ON THE MERITS.

WATKINS, J. The plaintiff, under executory proceedings, caused the property of defendant to be seized and sold, and at the sale a sufficient amount was realized to pay his debt with interest and cost, and leave a surplus of $2691.14 in the sheriff's hands, same constituting the matter of controversy in this suit.

Contemporaneously therewith another executory proceeding was begun on a mortgage second in rank, under the title of Wm. A. Gordon vs. David Mushet, against the same property; and it was also seized under a *fi. fa.* under a judgment entitled Henry Shepherd vs. Fairchild & O'Brien *et als.*, the defendant here being one of the parties defendant there.

Subsequent to the sale of the property, R. D. Shepherd, as testamentary executor of Henry Shepherd—plaintiff in the suit and judgment last mentioned—took a rule on Wm. A. Gordon, plaintiff in the executory proceedings above mentioned, the State Tax Collector, and the recorder of mortgages. For certainty of statement we have reproduced it from the brief of the counsel for Gordon, as follows, viz.:

"On motion of R. D. Shepherd, testamentary executor of Henry Shepherd, and on suggesting he is a judgment creditor of David Mushet herein in the sum of $6000, interest and costs, and that certain property belonging to David Mushet has been sold herein by plaintiff under a first mortgage.

"And on further suggesting the following mortgages appear inscribed against said property prior to that of your mover, namely:

"1. One in favor of Wm. E. Huger, book 328, folio 591, for $1500, by act before Charles G. Andry, notary, on the 14th of May, 1887, and recorded on same day.

"2. One in favor of Wm. E. Huger, book 372, folio 325, for $1500, by act before Chas. G. Andry, notary, May 8, 1888, recorded on the 9th of May, 1888.

"3. One in favor of Wm. A. Gordon, book 372, folio 327, for $2500, by act of 9th of May, 1888, recorded 10th of May, 1888.

"4. And that certain taxes are claimed as privileges against said property as due and owing to the city of New Orleans and the State of Louisiana.

"And on further suggesting that said purported mortgages, two for $1500 each and one for $2500, are not due or owing by said property, or by said David Mushet, and the recordation of same in the mortgage office deprives your mover of his rights as first judgment creditor, to be paid out of the proceeds of sale after the payment of the first mortgage.

"And on further suggesting, said proceeds of sale amount to the sum of $11,525, in the hands of the civil sheriff of this parish, who threatens, unless stayed, to pay said purported mortgages.

"And on further suggesting that all taxes as against said property, save and except those for the year 1892, are not due or owing by said property.

"It is ordered by the court that William A. Gordon, the State Tax Collector for the first district of this city, the city of New Orleans, and the recorder of mortgages, the civil sheriff, do show cause on the 25th day of July, 1893, at 11 o'clock A. M., why said mortgages and taxes should not be erased and canceled, and why your mover should not be paid from the proceeds of sale in the sheriff's hands, to the extent thereof in the amount of the judgment as aforesaid, and that in the meantime the said sheriff do hold in his hands the said proceeds of sale after the payment of the first mortgage, for which said property was sold, to abide the further orders of the court."

It appears that notwithstanding all parties named except the sheriff were duly cited, only Gordon appeared and filed an answer, which is as follows, to-wit:

"*First*—That said rule does not set forth why said mortgages are not due and owing by said property or by David Mushet.

"*Second*—That said mortgages having been recorded more than two years before the judgment held by Henry Shepherd became final, the said testamentary executor of Henry Shepherd can not now contest the validity of the said mortgages.

"*Third*—That the action of Henry Shepherd, or his executor, on his rule herein is prescribed, his action being limited by the articles of the Civil Code to one year from the time he obtained judgment against said David Mushet, and exceptor therefore pleads the pre-

scription of one year in bar of the action of the plaintiff in rule herein.

"*Fourth*—Exceptor pleads the prescription of five years."

During the progress of the trial, the plaintiff in rule filed the following plea of prescription, viz.:

"The plaintiff in rule, without admitting that the note of $1500, dated May 14, 1887, or the pretended mortgage which purports to secure it, ever had any legal existence, now says that if the same were valid originally, which is denied, the note is now prescribed and the mortgage extinguished.

"Wherefore, reserving all his other pleas and defences herein, the plaintiff in rule now pleads, under the express reservation herein contained, the prescription of five years against the said note and mortgage."

And after regular submission and argument the judge *a quo* rendered the following judgment, viz.:

"It is ordered, adjudged and decreed that the rule herein filed on July 19, 1893, by Rezin D. Shepherd, as testamentary executor of Henry Shepherd, be and the same is hereby made absolute; that the judicial mortgage of the late Henry Shepherd against David Mushet, recorded against the property herein sold, on May 23, 1890, in mortgage book 421, folio 20, has precedence over the mortgage granted by David Mushet in favor of Wm. E. Huger, on May 14, 1887, by act before C. G. Andry, notary public, to secure $1500, interest and costs, etc., recorded on the same day, and over the mortgage granted by the same in favor of the same on May 8, 1888, by act before the same notary, to secure $1500, interest and costs, etc., recorded May 8, 1888, and over the mortgage granted by the same in favor of W. A. Gordon, on May 9, 1888, by act before the same notary, to secure $2500, interest, costs, etc., recorded May 10, 1888; and accordingly the civil sheriff, Victor Mauberret, is hereby ordered, after paying out the proceeds of the sale herein made, the taxes due on the property herein sold and the full amount of the writ under which it was sold, to pay over the surplus of the said proceeds to the succession of Henry Shepherd, represented by the said Rezin D. Shepherd, on account of its said judical mortgage, the whole to the exclusion of and by preference over the defendant in rule, William A. Gordon, and all other persons."

It is from this judgment that the defendant in rule has appealed.

The serious question in this case is raised on the plea of one year's prescription that is urged in the answer of defendant in rule, and directed against the proceeding of the executor of Shepherd, as a revocatory action.

This contention is resisted by counsel for the plaintiff in rule—his insistance being that this is neither a revocatory action nor one *en declaration de simulation*, but that it partakes of the nature of a *concursus* or tableau of distribution.

They say in their brief, viz.:

"This is not a revocatory action, nor one *en declaration de simulation*. The appellant is mistaken when he says we urged, in the lower court, that it was the latter. It is a summary proceeding under which all parties claiming rights to a fund realized by judicial process are called to appear before the court under whose order the fund was realized, to assert the validity of their respective claims and counter-claims over it. The court passes upon the issues according to the facts disclosed on the trial of the rule, and classes the privileges and mortgages in a summary manner according to their rank. R. S. 1942; C. P. 126.

"The proceeding partakes of the nature of a *concursus*, and resembles a tableau of distribution to which oppositions have been filed, which 'are open to every objection of law and fact, such as minority, fraud, simulation, etc. In case of surprise a remedy may be afforded by a continuance, or even a new trial.' Succession of Lerude, 11 An. 386, 671; 40 An. 149."

But in the determination of this question we must be guided by the pleadings, taken as a whole, and not by the character of the rule the plaintiff has elected to adopt.

While it is true that plaintiff's rule purports to have been taken in the executory proceedings of Denegre vs. Mushet, yet it is a fact that neither of the parties who were cited to answer the rule were parties to said executory proceedings; and neither the plaintiff in the executory proceedings nor the sheriff holding the writ of seizure and sale were *cited* as parties to the rule.

After enumerating the mortgages that appear of record and as having been inscribed against the property *previous* to his own, plaintiff in rule alleges "that said purported mortgages"—mentioning them—"*are not due or owing* by said property, or by said David Mushet, and the recordation of same in the mortgage office deprives

your mover of his rights as *first judgment creditor*, to be paid out of the proceeds of sale after payment of the first mortgage."

The provisions of the Revised Statutes upon which the plaintiff's counsel place their reliance are as follows, viz.:

"Whenever a conflict of privilege arises between creditors, all the suits and claims shall be transferred to the court by whose mandate the property was first seized, either in *mesne process* or on execution, and the said court shall proceed to *class* the privileges and mortgages, *according to their rank*, in a summary manner, after notifying the parties interested." R. S., Sec. 1942. (Our italics.)

It is only "*a conflict of privilege*" between creditors that this statute comtemplates, or which authority is thereby conferred upon courts to classify, "according to their rank," in the summary manner pointed out; it does not purport to give the courts jurisdiction to *summarily* adjudge the *validity of debts* which are secured by privileges or mortgages, and by that means to displace one and advance the rank of another. It does not purport to authorize *mere strangers to the principal litigation* to be thus summarily coerced into court and compelled to submit their claim to investigation and judgment on simple rule without their having resorted to any judicial proceedings looking to the assertion of any claim on the proceeds of sale in the possession of the court.

The article of the Code of Practice cited is couched in precisely similar terms. Art. 126.

But conceding for the argument that plaintiff's construction of these provisions of law is correct, yet it is impossible for a *concursus* to have been created under the facts of this case—the sale of the defendant's property having been made under the mortgage *first in rank*, the *purchaser was entitled to retain and "apply the surplus of the price * * * to paying the special mortgages existing on the property subsequent to that of the suing creditor"* (C. P. 707), and, consequently, the sheriff was not entitled to its custody.

And, in so far as the general, judicial mortgage of the plaintiff is concerned the sale was made subject to it. C. P. 679, 710.

The purchaser at sheriff's sale was not cited nor made a party to the plaintiff's rule.

The case of Hibernia National Bank vs. Smith, 27 An. 59, presents a somewhat similar question—though it was a direct action instituted by *purchasers* of the mortgaged property at sheriff's sale made in

foreclosure proceedings in the collection of *one* of a series of several notes secured by the same mortgage, they having "retained in their hands the remainder (of the price) to pay prior encumbrances." The suit was accompanied by an injunction, and it had for object the prevention of a sale sought to be made in executory proceedings by the concurrent mortgagees. Of these proceedings the court said, that the various holders of the concurrent mortgage notes "under which the property was sold were made parties to a kind of *concursus*."

In Morris vs. Cain, 34 An. 657, in which, among other things, Lobe & Co., as intervenors, claimed the right, as *purchasers* of the mortgaged property, to have certain other mortgages thereon canceled and erased.

Of the character of this proceeding the court said: "We have no *concursus* before us." And in treating of their right to proceed as they had done, they further say:

"There can be no doubt that a *purchaser* at a judicial sale has the right of disencumbering the property adjudicated to him in the same manner as the expropriated owner could have done had he not been divested of ownership by the seizure and sale—that is, by paying the creditors, to secure whose claims the property was burdened. But although this right is coextensive, it is not greater, and the obligation of payment to which the purchaser may have subjected himself by retaining a portion of the price is not the same. * * * What the rights or claims may be which creditors interested in the amount retained may have, we are not called upon to declare in this controversy, and we shall abstain from doing so.

"Whatever that right and whatever the mode be in which it can be exercised, the order obtained on the proceedings instituted by Lobe & Co., which we would be made to view as an *interpleader*, is not sanctioned by law or precedents"—citing various authorities.

The case of Tessier vs. Bourgeois, 38 An. 256, is founded on a rule taken by the administrator of the succession of the mortgagor on the purchaser of the mortgaged property to turn over the surplus of the proceeds after paying off the claim of the ranking mortagage creditor by whom the sale was obtained, all of the other and junior mortgagees consenting and participating.

The court held that in such case the purchaser's right to retain the proceeds could not be exercised, the holders of the junior special

mortgages having appeared and "asked to be paid out of the proceeds of the sale; and similar proceedings (having) been resorted to by all the mortgage creditors, who have thus transferred their rights from the thing to the proceeds."

Of these proceedings the court said:

"The record shows a *concursus* among all the creditors who could possibly urge any mortgage claim against the property purchased by defendant in rule, who have all transferred their respective and adverse rights from the thing to the proceeds of sale."

The foregoing decisions make it clear that the instant case is not one of *concursus*. It does not possess any of the essential elements of a *concursus*. The plaintiff in rule is only a judicial mortgage creditor, altogether without interest in the surplus of proceeds; and the purchaser under the senior special mortgage was not made a party.

Giving to the rule its widest possible scope—and it is manifestly irregular and wanting in essential averment—it must be viewed as a revocatory action pure and simple. It is not an action *en declaration de simulation* in any sense. Viewed in this light it is evident that the defendant's plea of prescription of one year, as against a revocatory action, is good and should have prevailed in the court *a qua* (R. C. C. 1994); for it declares that "the action given by this section is limited to one year; if brought by a creditor individually, to be counted from the time he has obtained a judgment against the debtor."

The judgment rendered against the defendant, Mushet, in the case of Henry Shepherd vs. Fairchild & O'Brien et al. bears date May 14, 1890, and plaintiff's rule was filed on the 19th of July, 1893, and consequently more than the prescriptible length of time had expired at that date.

In the opinion or decree of the judge *a quo* nothing appears to indicate his views on this question, he having apparently assumed the position of the plaintiff to be the correct one and dealt with the merits alone, making no mention whatever of the defendant's plea of prescription.

It is our deliberate conviction that the plea of prescription should have been maintained, and that the judgment appealed from should be reversed.

It is therefore ordered, adjudged and decreed that the judgment

appealed from be reversed and annulled; and it is further ordered and decreed that there be judgment in defendant's favor, taxing all costs of both courts against the plaintiff and appellee.

Mr. Justice McEnery, not having heard the argument, takes no part.

Mr. Justice Parlange recuses himself, having been consulted as counsel.

No. 11,327.

STATE EX REL. ALGIERS BREWING COMPANY VS. FRED. D. KING, JUDGE DIVISION B, CIVIL DISTRICT COURT.

The only issue is whether the relator is entitled to a suspensive appeal from an order appointing a receiver.

The court of the first instance having acted upon the resolution of the company consenting to the appointment of a receiver, a suspensive appeal will not lie from the decree of appointment without proof that the resolution was *ultra vires*, or that it was, in other respects, illegal and improper.

The remedy to correct the alleged illegality in the appointment of a receiver is by rule to set aside and vacate the order of appointment, and, if the rule be denied, to appeal from the decision.

Whether the company consented legally is a question of proof to be considered on the trial of a rule.

APPLICATION for *Mandamus* and Prohibition.

Henry P. Dart and *F. B. Thomas* for the Relator:

1. On this application the only issue is whether the relator is entitled to a suspensive appeal from the *ex parte* order appointing a receiver—the correctness of the judgment will be passed upon when the record is brought up regularly for review. *Ex parte* Emanuel, 4 An. 424; Street's Case, 35 An. 516; Ingram's Case, 20 An. 530; Cain's Case, 20 An. 574; Geddes' Case, 36 An. 302, 210.
2. An affidavit by a third person, showing the nature and extent of his interest and the irreparable injury to be suffered, is according to the received practice; if the interest is controverted below, testimony may be taken on the issue thus raised: if the question is raised here for the first time the case will be remanded to discuss that issue with proper reservation of relator's rights, unless on the face of the record the interest is apparent. Bonnet's Case, 29 An. 397; Succession of Henderson, 2 Rob. 391; Street's Case, 35 An. 516; Ober vs. Excelsior Co., 44 An. 573.
3. A stockholder of the corporation thus placed in charge of a receiver has the right to suspensively appeal from the judgment. Morey's Case, 31 An. 825.
4. Where the sole issue presented by the demand is the appointment of a receiver, a judgment making such appointment is a final judgment, responsive to the allegations and settling all the issues between the parties.

   If held to be interlocutory it causes irreparable injury, for having been immediately executed it dispossesses defendant of its property, suspends its cor-

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porate functions and immediately fastens upon it the condition of an insolvent concern in process of liquidation; there remans nothing to do toward that end save to close out judicially its assets. C. P. 566, 580; Carey vs. Richardson, 35 An. 505.

5. Unless the denial of a suspensive appeal in such case rests upon the exceptions contained in C. P. 580, the appeal must be granted, as the designation of certain judgments has been interpreted as intentional omission of all others. Ingram's Case, 20 An. 529; Cain's Case, 20 An. 576, 577; Geddes' Case, 36 An. 301.

6. An *ex parte* order appointing a receiver is an absolute nullity, and will be reversed for that cause on appeal. Ober vs. Excelsior Co., 44 An. 571; State ex rel. Britten, 43 An. 832; Turgeau vs. Brady, 24 An. 348; Martin vs. Blanchin, 16 An. 237; High on Receivers, Secs. 111, 112, 346; State ex rel. Morey, 31 An. 823, 836; Reder vs. Maas, 34 An. 130.

There is no authority requiring the taking of a rule to rescind such judgment, leaving the assets in control of the receiver; "a judgment rendered in his favor after years of litigation restoring to him his property would come too late to afford a remedy. The injury might be irreparable." DeBaillon vs. Ponsony, 5 N. S. 42; State ex rel. Taylor, 26 An. 65; Street's Case, 35 An. 516, 517; Analogous cases, 12 An. 455; 35 An. 745; 2 Rob. 342; 23 An. 50-52.

7. Whether defendant (under the peculiar allegations of plaintiff's petition) consented is a question of proof to be considered when the record is regularlyhere on appeal.

If considered now the alleged consent must be taken in its entirety—a consent to a judgment in favor of another plaintiff to be rendered and executed in another forum, looking to the appointment of a receiver acceptable to stockholders, mortgage bondholders and creditors, can not be construed into a consent to the proceedings here complained of.

The consent can not be divided.

If taken as a whole, the judgment rendered in this cause is in flat derogation of its terms and contrary to the principles established in similar cases. In re Savings Bank, 35 An. 200; In re Herdic Coach Company, 35 An. 246.

Where a judgment rendered on the written consent of parties does not conform to that consent, either may appeal to correct the error. Sprowl vs. Stewart, 19 An. 433; Police Jury vs. McDonogh, 8 An. 342.

8. The acquiescence by the board of directors of a corporation in a judgment appointing a receiver must be accepted as a whole. If on conditions which are not permitted by the court it is no acquiescence. In any event these officers can not consent to the appointment of a receiver; such an act is *ultra vires*. State vs. Atchafalaya Railroad, 5 R. 68; Curein vs. Santini, 16 An. 27; State vs. Bank, 31 An. 831; Morawstz on Corporations, Secs. 512, 513.

The acquiescence must furthermore be absolute C. P. 567; Jackson vs. Michie, 33 An. 727; Succession of Lamm, 40 An. 312; Meyer vs. Schurbruck, 37 An. 373, Buntin vs. Johnson, 27 An. 625.

Third persons can not be prejudiced by defendant's acquiescence. State ex rel. etc., 29 An. 146; Lawson vs Bruenn, 29 An. 868.

Horace E. Upton and *Lazarus, Moore & Luce contra:*

No appeal lies from the orders of the lower court, on an *ex parte* application of a third person, without proof, contradictorily taken in the lower court, of the interest of said third person and the irreparability of the injury to be sustaine 34 An. 3; 32 An. 1192; 33 An. 108; 24 An. 426; 7 N. S. 345.

The remedy to correct the improvident and irregular appointment of a receiver is by rule to set aside and vacate the order of appointment, and if that rule be denied, to appeal from the decision. 43 An. 123; 43 An. 829; 8 Paige (N. Y.) 481.

Relators having acquiesced in and approved of the appointment of a receiver, are precluded and estopped from appealing therefrom.

An interlocutory order declaring the necessity for the appointment of a receiver, and appointing the same, can not work irreparable injury, inasmuch as it is not a definitive judgment which can acquire the force of *res judicata*. Coats vs. Cunningham, 80 Ill. 467, and authorities; Adams Eq., 6 Am. Ed. 684, 688, 689; 3 Stockton, 126; 6 Howard (U. S.), 204; 4 Scan. 326; 5 Glim. 35; 21 Ill. 207; 13 Ill. 31; 15 Ill 228.

In no event can a suspensive appeal be taken from an order appointing a receiver, same being one of that class of orders which are executed provisionally, notwithstanding an appeal. C. P. 580, Sec. 2.

The opinion of the court was delivered by

BREAUX, J. The relator is engaged in the business of brewing and selling beer and is the owner of a brewery.

On 28th August, 1893, the Lafayette Bank of Missouri, claiming to be a creditor, instituted suit and applied for the appointment of a receiver.

A receiver was appointed; he qualified and took possession of the property.

The relator moved the court to grant it a suspensive appeal from the judgment appointing a receiver, as well as from all other orders granted under the order of appointment.

The court declined to grant the motion.

The writs applied for from this court are for the purpose of compelling the district judge to grant the order of appeal for which an application was made.

The relator in the petition for writs of *mandamus* and prohibition substantially alleges that it is true that after the appointment of the receiver the board of directors of relator were induced to hold a meeting and were misled into passing a resolution framed as follows:

"NEW ORLEANS, August 31, 1893.

"The board met to-day with the following members present: Dr. E. Y. Ames, J. J. Clarke, William Gaiser, H. V. Boubade, J. M. Lotz and F. A. Godefroy.

"The president called the meeting to order and stated that the purpose was to explain the situation now existing with reference to the pending suit of the Lafayette Bank of St. Louis against the Algiers Brewing Company, in which application has been made for

the appointment of a receiver, and John H. O'Connor has been appointed a receiver. The necessity for the appointment being recognized and the appointment having met with the approval of the board after discussion, it was moved by Mr. Lotz, seconded by Mr. Godefroy, that Dr. E. Y. Ames be suggested and recommended to the court for and in behalf of this corporation to act as co-receiver in the suit of the Lafayette Bank of St. Louis vs. Algiers Brewing Company, with John H. O'Connor receiver herein, said suit being now pending in the Civil District Court for the parish of Orleans.

"It was further resolved that a copy of this resolution be presented to the Hon. F. D. King, judge of said court, accompanied by a petition containing proper averments asking for the immediate appointment of Dr. Ames as co-receiver in the interest of the stockholders of the company."

The relator alleges that the board subsequently rescinded the foregoing resolution as *ultra vires*, null and void, and instructed their attorney to take immediate steps to revoke the appointment of J. H. O'Connor as receiver and to restore the property of the brewery to its previous condition; that the rescinding resolution was presented to the Civil District Court and permission asked to have it spread upon the records of the court, which permission was refused.

The respondent judge returns that the Algiers Brewing Company having, by resolution, approved the appointment by the court of a receiver, he declined to allow a resolution purporting to rescind the action *ex parte* to be spread on the minutes; the court considering that if there is any error in the order appointing a receiver, that the proper mode of procedure is that pointed out in Whitaker vs. Ashbey, 43 An. 123, and State *ex rel.* Brittin vs. New Orleans, *Id.* 829, to move for the rescinding of the appointment ordering a receiver.

That he was not advised as to the truth or falsity of the allegations of the relator, that the resolution consenting to and approving the appointment of a receiver was the result of surprise, deception and misinformation as alleged; that if they are true and it constitutes in law cause for the annulment of the orders made by him, such orders could have been rescinded, on motion to that effect, after trial contradictorily with all parties in interest; that he suggested and invited from the bench such action, and assured counsel that he would make such rule returnable within the shortest possible delay

He denies that the action of the board of directors in approving and consenting to the appointment of a receiver is *ultra vires*.

That whether *ultra vires* or not depends upon the terms of the charter of the Algiers Brewing Company and the action of the stockholders. That these facts can be determined only by evidence taken contradictorily with all the parties in interest in the court of the first instance.

That if a rule had been taken out as suggested by him, investigation and inquiry could have been had and decision thereon rendered, but relator failed and neglected to adopt such a course, clearly pointed out by law.

The relator on the face of the papers having acquiesced in the appointment and voluntarily ratified the decree of appointment, the Supreme Court will not set aside the order granted and thus ratified without evidence showing the necessity for rescinding the decree appointing the receiver.

The order of the court of the first instance was based upon the consent of the board of directors.

We will not assume, without any evidence before us, that the court erred in thus placing confidence in the first resolution adopted by the Algiers Brewing Company approving the appointment of a receiver.

If, as alleged, there was deception practised which influenced the board, and if the action was *ultra vires*, and if other grounds of nullity pleaded are cause sufficient to set aside the order appointing a receiver, they should be brought up, after hearing, contradictorily with the parties in interest.

The court will not assume that the grave charges made are true and proceed to a hearing upon that hypothesis with the view of rescinding the order of appointment.

The granting of a suspensive appeal upon those grounds would have the effect of temporarily sanctioning the charges, as if proven.

Upon unproven averments the Algiers Brewing Company, would suspend the execution of an order to which it consented.

Such would be the effect of a suspensive appeal. Parties can not sustain contradictory positions.

It would be encouraging proceedings to no purpose to grant a suspensive appeal.

Therefore we will not grant the writs applied for by the relator, and we relegate them to the District Court of original jurisdiction or any remedy to which it may be entitled.

Whether the company consented legally is a question of proof, which must come to this court, as proof in other cases is brought up, on an appeal.

It is ordered, adjudged and decreed that the restraining order be rescinded and relator's demand rejected.

DISSENTING OPINION.

MCENERY, J. On August 28, 1893, the Lafayette Bank of St. Louis filed a suit in the Civil District Court for the parish of Orleans, for the appointment of a receiver to the Algiers Brewing Company.

In the application for the appointment of a receiver, it is averred that the management of the company was characterized by waste, extravagance and recklessness; that the mortgage bonds of the company were sold at the rate of fifty cents on the dollar by said company as the result of a combination and conspiracy between the management of said brewing company and certain persons named in the petition; that a great number of suits were pending against said company; that the entire plant was under seizure in the suit of August Borman vs. said company, to satisfy a debt of $333.33, in pursuance of a judgment rendered in said suit, and the same was authorized to be sold by the sheriff; that certain parts of the machinery of said company were in the hands of the sheriff under writs issued in the suit of First National Bank of Chicago vs. said company; that six mules were also under seizure in another suit against said company; that certain members of the board of directors, acting in concert with certain stockholders of said corporation and certain bondholders, had conspired and confederated together to obtain possession of the entire plant of said corporation in satisfaction of their bonded indebtedness under consent proceedings to be instituted in the United States Circuit Court; that the board of directors and stockholders of said corporation had passed a resolution and signed a paper agreeing and consenting to an application about to be made on behalf of one of the bondholders, acting for himself and the other bondholders, for the immediate appointment of a receiver to administer the property of said corporation through the interposition of the United States Circuit Court, thus establishing consent to the appointment of a receiver and recognizing the necessity therefor. The corporation is alleged to be in an insolvent condition.

On this application an *ex parte* judgment was rendered appointing

a receiver to be "invested with all the powers with which receivers are invested under the law." He was directed to take charge of the property of the corporation, and the proceedings in case of Borman vs. said company were ordered stayed and the mules and machinery sequestrated in the other suits were ordered in the possession of the receiver without prejudice to the rights of the seizing creditors under their writs.

Accompanying the petition the plaintiff, who applied for the order, filed some evidence to substantiate the allegations in the petition. But the proceedings were conducted contradictorily with no one, and the judgment appointing the receiver was solely *ex parte*.

Within ten days after signing the *ex parte* judgment appointing a receiver, the relator applied for a suspensive appeal from the judgment and tendered a bond. The appeals were refused. Hence the application to this court for the necessary writs to enforce the granting of the appeals.

In the briefs filed there is considerable length devoted to the question whether or not the respondent judge had the power to issue the *ex parte* order appointing a receiver.

The order may or may not have been properly granted. This question can only be determined when the judgment is before us on appeal. Our inquiry is now restricted to whether the relator is entitled to a suspensive appeal from the *ex parte* judgment.

The application for the suspensive appeal is resisted on the following grounds: (1) That the creditors and stockholders were not parties to the judgment, and as third parties they must produce proof, which must be established contradictorily with the parties to the judgment, that they have an appealable interest; (2) that the judgment is interlocutory and works no irreparable injury; (3) that the remedy to correct such an appointment is by rule to set aside the judgment, improvidently granted, and an appeal from the judgment on the rule.

The other grounds of consent to the appointment of a receiver and the acknowledgment of its necessity properly belong to the investigation of the rightful issuance of the order from which an appeal is asked.

1. On the first point it is evident that in the present proceeding the question raised properly belongs to the proceedings on appeal in a motion to dismiss the appeal. In application to this court in the

first instance for writs, the interest of the parties is presented on a *prima facie* showing. The petition of relator shows an appealable interest, and this petition is accompanied by his affidavit. Even when the appeal is on file in this court it is sufficient if the record shows a pecuniary interest. State *ex rel.* Bonnet vs. Judge *at hoc*, 29 An. 397.

In the case of Insurance Co. vs. Costa, 32 An. 3, this court said that this pecuniary interest may be shown by proper affidavit, indicating the nature and extent of the right imperiled by the decree and by the recitals of which the opposite parties would be so minutely informed as to be enabled to conclude, by an inspection of the evidence itself, whether to contest or acknowledge the applicant's right to an appeal.

2. An interlocutory order is something which is ordered by the court between the commencement and end of a suit which decides some preliminary part or matter, which, however, is not a final decision of the matter in issue. From this class of decrees an appeal is permitted when an irreparable injury may result from its enforcement. But in a judgment appointing a receiver certain facts have to be presented and passed upon by the judge to whom the application is presented, and the decree in such a case possesses some of the elements of a final judgment, which requires the signature of the judge and belongs to that class named in the Code of Practice, distinguishing them from interlocutory orders, which do not require the signature of the judge, but which must be correctly entered in the record. Code Practice, 537, 544, 546; Starke vs. Burke, 9 An. 345.

The facts alleged by respondent in his application for the appointment of receiver, such as the abandonment of the franchises of the corporation, its insolvency, and the conspiracy between the shareholders and directors, are matters which by a definite judgment may become *res judicata* between the parties to the litigation. Code Practice, 539.

A judgment contradictorily rendered is that which has been given after the parties have been heard, either in support of their claims or their defense. Code Practice, Art. 535.

The usual method of appointing a receiver is after the parties have been heard, and a judgment is rendered on the facts presented. That there is a consent judgment does not detract from the force of the judgment, as the facts are admitted and proof by witnesses and

documentary evidence dispensed with. All such judgments have to be signed as final judgments, which may become definitive as to the issues presented by abandoning an appeal, or by a final judgment of the appellate court.

From all such judgments an appeal will lie, and the reports of this State will show that appeals from judgments appointing receivers have never been denied.

3. It is urged by plaintiff and respondent that the relator should have provoked a rule to set aside the *ex parte* judgment appointing a receiver, and an appeal should have been taken from the judgment on the rule.

I fail to see the force of this argument. In some cases in the exercise of the supervisiory jurisdiction of the Supreme Court over inferior tribunals, it may be required that the applicant for relief exhaust his remedies in the lower court. In the exercise of the right of appeal if the party cast could appeal from a judgment rendered contradictorily with him, there seems to be a stronger reason why he should be permitted to do so if the proceedings leading to the judgment have been *ex parte* and irregular.

What reason is there for the proposition that the defendant should proceed by rule and ask a reversal of the judgment as a prerequisite to an appeal? The presumption is that the judgment is valid, and why should the defendant require the court to reverse its proceedings as irregular and proceed regularly to pronounce judgment before an appeal should be allowed? The time of the court should not be occupied in order to reach such a result when it can be accomplished by a direct proceeding by appealing at once from the judgment. It avoids expense and delay, and the convenient and speedy administration of justice is the first consideration of courts in the disposal of cases. But it is from the judgment rendered from which the defendant has the right to appeal, no matter how rendered, so that it is final, or an interlocutory order that may work an irreparable injury. The jndgment may be null and void from irregularities in the proceedings. The defendant has the right to attack it and have its nullity declared, either by appeal or an action of nullity. The relator herein has chosen the first mode of proceeding—by an appeal, a constitutional right which can not be denied him. State *ex rel.* Johnson vs. Judge, 36 An. 210; State *ex rel.* Morey vs. Judge, 31 An. 823-836.

4. It is suggested in respondent's brief that the action of the court in the appointment of a receiver is not reversable on appeal.

This doctrine has been unquestionably held in other jurisdictions, but in this State there is no statutory proceeding authorizing the appointment of a receiver to a corporation, and the assumption of such authority by the courts has only been in extreme and special cases, such as where the property of the corporation has been abandoned or where there are no persons authorized to take charge of or to conduct its affairs. Baker vs. Railroad Co., 34 An. 754; State *ex rel.* Brittin vs. City, 43 An. 830.

And this authority has heretofore been exercised when all the parties were before the court.

Whether there was a consent proceeding in the lower court to authorize the *ex parte* judgment appointing the receiver can only be determined when all the facts are before us on appeal.

The respondents contend that in no event is the relator entitled to a suspensive appeal, and Art. 580 of the Code of Practice is referred to as being conclusive on this point.

The judgments which are executed provisionally are mentioned in said article and rendered in the matter of the appointment of tutors and curators of incapacitated persons, and syndics of creditors where they are ordered to administer provisionally as creditors of vacant successions. The reasons for these exceptions are obvious. The necessity for some one to take care of the incapacitated persons or vacant estate is imperative, and the syndic provisionally appointed remains in charge of the provisional administration only, without power to sell, his acts only being conservatory until a regular syndic is elected by the creditors. In this case there was no provisional appointment of a receiver with power limited to conservatory acts, but he has the amplest power under the order for a full administration, extending to the sale of the effects under the order of court and a general winding up of the concerns of the corporation.

The article referred to does not include a judgment relating to such matters.

If a party has a right to appeal, the rule is that he can appeal suspensively, and I find no exception to the judgment in appointing a receiver to a corporation with full powers of administration. The directors had no power to consent to the appointment of a receiver. The shareholders only could give this consent. The directors are only the agents of the shareholders and can not do any act not authorized by the charter.

Rehearing refused.

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No. 11,330.

STATE EX REL. WILLIAM GAISER VS. FRED. D. KING, JUDGE.

The courts have power to appoint receivers of corporations whenever necessary to preserve the interest of all concerned, and those who have ratified the appointment can not recall their consent, and in *ex parte* proceeding prosecute a suspensive appeal from the order appointing the receiver.

The order appointing the receiver in effect sustains the *status quo* of the corporation, and was issued to prevent instead of to cause injury.

Should it become apparent that the injury is actual or threatening, the appeal will be allowed upon proper application.

The writ prayed for to compel the district judge to grant a suspensive appeal is refused.

APPLICATION for *Mandamus* and Prohibition.

Henry P. Dart and *F. B. Thomas* for the Relator.

Horace E. Upton and *Lazarus, Moore & Luce contra.*

The opinion of the court was delivered by

BREAUX, J. The Algiers Brewing Company is a corporation organized under the general incorporation laws of the State.

There exists against it mortgages and unsecured debts in an amount in excess of its assets.

It is alleged that the management was characterized by waste, extravagance and recklessness; that the mortgage bonds of the company were sold by the company at the rate of fifty cents on the dollar, in accordance with a combination entered into between the management of the company and certain persons named; that there are a number of suits pending against it, and the entire plant was under seizure in the suit of August Borman vs. The Algiers Brewing Company, to satisfy a debt of $333.35, and advertised for sale, and that part of the machinery had been sequestered; also a number of mules of the company. That members of the board of directors, acting with certain stockholders, had combined and conspired to obtain possession of the entire plant in settlement of bonded indebtedness under consent proceedings to be instituted in another court.

The Lafayette Bank of St. Louis filed in the court *a qua* a suit for the appointment of a receiver to the Algiers Brewing Company.

The district judge in appointing the receiver, on the application made, states, as reason, that the sale of an important part of the machinery necessary to conduct the business of the brewery will operate to the injury of all concerned.

That it is a proper case for the exercise of the equitable powers of the court in the interest of all the creditors.

And he directed the receiver to take charge of the property; to inventory it, and report to the court, within ten days, the property owned by the company, together with an appraisement; that he take oath to discharge the duties required and furnish bond in a stated amount.

The sheriff was directed to suspend the sale under the execution issued until the further orders of the court; the receiver was authorized to take possession of the property seized and of the property sequestered, without prejudice to the rights of the respective plaintiffs, and to retain possession until the further order of court.

In support of his action in issuing the above order, the respondent returns that the Lafayette Bank of St. Louis filed in the court over which he presides, in the suit of that bank against the Algiers Brewing Company, a certified copy of the bill of the Tinker & Smith Malting Company vs. Algiers Brewing Company, praying for the appointment of a receiver by the Federal court, which bill was verified by the oath of their solicitor, together with the resolution of the Algiers Brewing Company passed on the 20th of August, 1893, at a meeting at which the relator, as a director of the company, was present and voted for the appointment of a receiver.

Demonstrating the absolute necessity, advisability and prudence of the appointment of a receiver for the administration of the affairs of that brewing company, the solicitor in the answer before that court alleged, "for further answer respondent says that it believes the true interest of all the creditors, secured and unsecured, as well as the stockholders of said company, requires the appointment of a receiver."

That subsequently the board of directors of the Algiers Brewing Company adopted a resolution recognizing the necessity for the appointment of a receiver and approved the appointment that had been made by the respondent. The relator as a director took part in the meeting and voted for the approval as adopted by the board.

A creditor for a large amount and several bondholders intervened and opposed the relief sought.

The respondent further returns that the attorneys for relator applied for a suspensive appeal from the judgment rendered August 29, and from all other decrees and orders entered.

That he refused to grant an appeal because the orders rendered did not occasion irreparable injury; that there is no law authorizing such an appeal; that the mover for the appeal was a member of the board of directors of the company and approved the appointment.

The respondent also states that on the same day the Algiers Brewing Company offered to have spread on the minutes of the court what purported to be a copy of a resolution of the board of directors of the company revoking the action of the board of 31st August, 1893, approving the appointment of a receiver.

The court declined to permit the filing of this copy and states as ground for refusal that if there is any error in the order appointing a receiver, the proper mode of procedure is that pointed out in 43 An., Hackett vs. Creditors; that is, to move for the rescinding of the appointment ordering a receiver, and then the resolution of the board of directors complained of can be offered in evidence and the court's action obtained. The relator also returns that, if the charges be true that the resolution of the 31st August, 1893, approving the appointment of a receiver, was the result of a surprise, deception or misinformation, and it constitutes a cause for the annulment of the orders issued, they could have been rescinded and annulled on motion to that effect and after trial contradictorily with all parties in interest.

That he suggested and invited from the bench such a course, and assured counsel for relator that he would make such a rule returnable within the shortest possible delay.

The respondent denies that the action of the board of directors is *ultra vires*, or that whether *ultra vires* or not depends upon a question of fact, that is the charter, which fact can only be determined after evidence taken contradictorily with the parties in interest, which course the relator refused to follow.

In litigation pending before the court *a qua*, that tribunal became impressed with the necessity of maintaining the *status quo* of the Algiers Brewing Company during the trial of issues over which it had jurisdiction.

The strongest possible allegations, verified by oath, had been made against the management, and interested parties had expressed apprehension, in legal form, of irreparable and unavoidable loss, if action was not taken to prevent it.

Thereupon the court issued orders in effect judicially sequestering the property and placing it in the hands of a receiver.

They are specific and guarded.

The receiver was made to qualify and give a bond in an amount the court deemed sufficient.

He was directed to appraise the property and make an inventory, and a time was stated for his return.

He was specially enjoined not to sell any property and was charged with administering the affairs of the corporation in the interest of all concerned.

These legal steps, at first, met with the approval of the relator.

Subsequently, after preliminaries toward administering the affairs of the company had not only been taken, but had become accomplished facts, the receiver had qualified, was in possession and administering under the orders of the court, the relator appeared in court and moved for a suspensive appeal.

The effect of this appeal will be to set aside all that has been done and revoke, for the time being at least, all that was sought by the order.

There is no injury possible, either immediate or remote, such as the law contemplates in order to give a right of appeal.

If the court's authority be sustained there can not be any disposition made of the property in violation of law, and without an effective remedy.

The possibility of irreparable injury was the moving cause in obtaining the court's order.

The relator, who joined in the proceedings to that end, can not *ex parte* be heard to set proceedings aside by a suspensive appeal on motion without notice to other interested parties, especially as we do not discover that in the proceeding to prevent irreparable loss an irreparable loss is threatened which gives the moving party a right to a suspensive appeal.

We confine our decision to the question of irreparable injury and determine nothing further than that there is not in the case as presented an irreparable injury authorizing an appeal at this time.

Should it be made apparent hereafter that there is such injury, either actual or threatening, the appeal will be allowed upon proper application for an appeal.

It is therefore ordered and decreed that the restraining order herein granted be set aside, and that the relief prayed for be refused at relator's costs.

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No. 11,328.

STATE EX REL. FOX & SEARLES VS. FRED. D. KING, JUDGE DIVISION B, CIVIL DISTRICT COURT.

The same issues are presented in State ex rel. Gaiser vs. Judge, No. 11,330, slightly varying in statement, and as the reasons and authorities therein given are directly applicable, a conclusion similar is followed.

The only question is one of authority *vel non* to appoint a receiver, and the legality of a resolution of the company approving the appointment.

The issues must come up on appeal, if at all, after proof heard before the court of first instance.

APPLICATION for *Certiorari*, Prohibition and *Mandamus*.

Henry P. Dart and *F. B. Thomas* for the Relator.

Horace E. Upton and *Lazarus, Moore & Luce contra*.

The opinion of the court was delivered by

BREAUX, J. The grounds on which the relators claim relief are, that on the 28th August, 1893, the Lafayette Bank of St. Louis, co-respondent herein, filed a suit in the Civil District Court, in which the single issue was the appointment of a receiver, the court being incidentally requested to stay certain proceedings against the Algiers Brewing Company, the party defendant therein, an alleged insolvent corporation. That they are a commercial firm, domiciled in the city of New York, and doing business under the firm name and style of Fox & Searles, and ordinary creditors of the defendant, in the sum of $500, less a credit of $99.30, represented by a promissory note, and in a second sum of $3064.

That the defendant company is owner of the Algiers Brewery, which has a value in excess of $200,000. That upon the averments

of plaintiff's petition an order was granted by the respondent judge, in vacation, *ex parte* and without notice to the stockholders or to the brewing company, or to any other person or creditor interested, and which is to the following purport:

That considering the existence of certain suits against and seizures of the property of the brewing company, and that the defendant corporation, through its board of directors, has consented to the appointment of a receiver; and further considering that the sale of an important part of the machinery necessary to conduct the business of the brewery, is about to take place, and that a sale will operate to the manifest injury of all concerned, unless the order to sell is stayed; and further considering that this is a proper case for the exercise of the equitable powers of the court, in the interest of all creditors, secured as well as unsecured, and for the appointment of a receiver to take charge and conduct the business of the corporation, subject to the order of the court, or to make such disposition of the property as is fair, equitable and just, a receiver is hereby appointed and entrusted with all powers with which receivers are invested under the law.

The order further directs that the receiver appointed shall take charge of the property and effects of the corporation, and cause same to be inventoried and appraised, and that the civil sheriff be directed and required to suspend the sale under *fi. fa.* in his hands as well as all other proceedings under the writ of sequestration.

Of the foregoing proceedings and order the relators complain that within ten days of its rendition they applied to the respondent judge for permission to intervene in said suit for the sole purpose of appealing suspensively from said order, and thereupon moved the court for a suspensive appeal returnable to this court tendering bond and security and that the respondent refused his application.

The grounds assigned in argument by counsel for respondent are as follows:

1. That creditors can not as third persons appeal *ex parte* without proof contradictorily taken to establish an interest.

2. That the judgment complained of is interlocutory and does not work an irreparable injury.

3. That the remedy for any injury such an order may inflict is by rule to have the order set aside.

The same issues are presented in State ex rel. Gaiser vs. Judge, No. 11,330 *post*, slightly varying in statement, and as the reasons and authorities therein given are strictly applicable, we adopted them as decisive in this case.

It is therefore ordered, adjudged and decreed that the rule *nisi* be set aside and relators' demand rejected at their cost.

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No. 11,329.

STATE EX REL. GEORGE D. FELDNER VS. FRED. D. KING, JUDGE DIVISION B, CIVIL DISTRICT COURT.

Same as in State ex rel. Gaiser vs. Judge, No. 11,330.
The rule *nisi* is vacated and the writs applied for are refused.

APPLICATION for Certiorari and Mandamus.

Henry P. Dart and *F. B. Thomas* for the Relator.

Horace E. Upton and *Lazarus, Moore & Luce contra.*

The opinion of the court was delivered by

BREAUX, J. The only question to be determined is the right of an alleged stockholder in a joint stock company to appeal *vel non* from a judgment appointing a receiver to the company.

Contradictorily with the officer of the company a receiver was appointed; after his appointment he qualified and was placed in charge of the affairs of the corporation under an order of court.

A *prima facie* showing was made of acquiescence on the part of the board of directors.

This acquiescence was an issue in the case of the State of Louisiana ex rel. William Gaiser vs. King, Judge, decided recently by this court.

The legal question is similar in every respect in this case.

The cases were submitted at the same time and the points are argued in one brief.

For reasons assigned in the Gaiser case it is ordered, adjudged and decreed that the restraining order be set aside and the relator's demand rejected at his costs.

No. 11,416.

STATE VS. H. H. STEWART.

The judge refused to permit the district attorney to move for the forfeiture of the bail bond of the accused on the second day of the criminal term, and based his ruling, in thus ruling, upon proof that the accused was prevented from attending court by physical disability.

The Attorney General and the district attorney of the district admit that the ruling was correct, and consent to the dismissal of the appeal.

APPEAL from the Tenth District Court, Parish of Natchitoches. *Andrews, J.*

M. J. Cunningham, Attorney-General, and *Pharor Breazeale*, District Attorney, for Plaintiff and Appellant.

Pierson & Porter for Defendant and Appellee.

The opinion of the court was delivered by

BREAUX, J. The appeal was prosecuted by the district attorney from a ruling of the court *a qua* refusing to permit him in behalf of the State to forfeit the bail bond of the accused on the second day of the term.

The ruling of the court is sustained by the evidence.

It was proven that the accused was prevented from attending court by physical disability.

Counsel for the accused interposed a motion in this court to dismiss the appeal, averring the correctness of the ruling of the District Court.

The Attorney General and the district attorney who conducted the prosecution admit that the appeal has no merit, and consent that it be dismissed.

The appeal is dismissed.

No. 11,418.

STATE EX REL. POLICE JURY OF ST. MARTIN PARISH VS. A. A. DUPRE, JUSTICE OF THE PEACE.

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Where a party appears and excepts to want of citation in a cause, which is overruled, and he then, reserving his rights under the exception, files a plea to the jurisdiction, the latter plea is not such an appearance as to cure the want of citation

The political corporation known as a parish may be sued within its territorial limits in any court of competent jurisdiction.

Under the provisions of Art. 1077, Code of Practice, any constable of the parish can serve the citation issued by a justice of the peace. If the constable is an interested party the citation must be served by another constable or the sheriff.

APPLICATION for *Certiorari* and Prohibition.

R. F. Broussard, District Attorney, for the Relator.

Respondent *in propria persona*.

The opinion of the court was delivered by

McEnery, J. J. O. Halphin, Jr., brought suit against the parish of St. Martin for a small sum, unappealable in amount.

Eug. A. Duchamp is president of the police jury of said parish.

The citation was addressed to him personally and individually. The police jury of said parish filed an exception to the citation on this account. The exception was overruled. Reserving the rights in the exception the defendant police jury filed an exception to the jurisdiction of the court, *ratione personæ*, alleging that the police jury must be sued at the domicil of the parish, which was in the first ward instead of the fifth, in which the parish was cited to appear.

The citation was defective, as the parish had not been properly cited, through its official head the president of the police jury of said parish. The appearance in the exception to the jurisdiction did not waive the defective citation, as all rights were reserved when the exception to the jurisdiction was filed, that were urged in the exception to the citation. Lukis vs. Allen, opinion on rehearing, recently decided. 45 An.

The relator therefore prays for a writ of prohibition directed against the respondent justice on account of the nullity of the proceedings for the defective citation and the want of jurisdiction. On the first ground the application for the writs must be sustained. We will notice the second, because the case may be further prosecuted on a legal citation, and the second ground may again be presented.

The police jury of St. Martin parish holds its sessions and transacts its business in the first ward at the parish site. But this does not fix the presence of this political corporation exclusively at this point.

It is present everywhere throughout the territorial limits of the parish, and may be sued like the State when its permission is granted for this purpose, in any court of proper jurisdiction, within its territorial limits. State *ex rel.* Police Jury vs. Judge. 41 An. 403.

Objection is also made to the service of citation by the constable of the fifth ward. In this, as in the objection to the jurisdiction, the rights of the exception to the citation were reserved.

Art. 1077 of the Code of Practice says that "when a suit is instituted before a justice of the peace he shall make a note in his record of the date and nature of the demand, and shall immediately prepare a citation setting forth the amount and nature of the demand, to call the defendant before him to answer said demand, and he shall deliver said citation to any constable of the parish that it may be served on the defendant."

If the constable is an interested party, as alleged by relator, the service of citation must be made by some other constable of the parish, or the sheriff.

It is therefore ordered, adjudged and decreed that the judgment rendered by said justice of the peace, fifth ward, parish of St. Martin, be annulled and set aside, defendant to pay costs.

No. 11,346.

LOUIS SUBERVILLE, HUSBAND, VS. LORENZA ADAMS, HIS WIFE.

1. In case the wife, sued for a divorce, sets up, by way of reconvention, a counter demand for a separation, it is competent for the plaintiff to rebut the defendant's evidence by the introduction of evidence pertinent thereto, notwithstanding it be inapplicable to his principal demand, which has been disallowed.
2. No formal answer to or denial of the averments of the defendant's reconventional demand is contemplated in our law, and the plaintiff may introduce any evidence in rebuttal or disavowal of same, in the same manner, and to the same extent that he might under a formal denial thereof.
3. The conditions on which the wife can be awarded alimony are: 1st, that she shall have instituted suit for a judicial separation, or one *a mensa et thoro*. 2d, that she shall have left or declared her intention to leave her husband's domicil; and 3d, that the judge shall have assigned her a home wherein she shall reside during the pendency of the suit.
3. The husband can not be compelled to pay alimony unless the wife proves that she has constantly resided in the home assigned her by the judge.

APPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

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116 698
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119 990
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Jos. N. Wolfson and *A. L. Tissot*, for Plaintiff and Appellant.

W. S. Benedict, *H. C. Cage* and *Robt. G. Dugué* for Defendant and Appellee.

The opinion of the court was delivered by

WATKINS, J. This suit was instituted by the husband against his wife for a divorce *a vinculo matrimonii*, grounded on a charge of adultery.

To the petition the defendant tendered the exceptions of no cause of action and vagueness; the former being overruled, and the latter sustained, the plaintiff amended his petition by first reiterating the averments of his original petition, and then alleging that the defendant had committed adultery several different times with a certain person with whom she was upon most intimate terms; and that she had visited houses of assignation for that purpose at several different dates that are mentioned, and places particularly specified where said acts of adultery were committed. He then adds the general averment that the defendant did, at the assignation houses indicated, "then and there, and at other dates to petitioner unknown, commit acts of adultery with a person or persons unknown."

To this supplemental petition the defendant filed the further exception of vagueness, coupled with a general denial, and subsequently she filed a supplemental answer disavowing all the charges contained in the plaintiff's original and supplemental petitions; and assuming the character of plaintiff in reconvention she claimed a separation from bed and board from the plaintiff.

The grounds on which she claimed a separation are substantially as follows, to-wit:

That the plaintiff, her husband, had been guilty of cruel treatment and outrages towards her of such a nature as to render their living together insupportable; and this charge is further supplemented by a specification to the effect that in April and May, 1892, he deserted and abandoned the matrimonial domicil, leaving her destitute; and afterwards resorted to a simulated and fictitious sale of the family homestead, in order to dispossess her of the premises; and, further, that he has since failed to contribute to her support. She also avers that the plaintiff has publicly defamed her by charging her with adultery in the instant suit.

Coupled with her demand for a judicial separation *a mensa et thoro* is a demand for alimony at the rate of $60 per month during the pendency of the suit.

The trial resulted in a judgment against the plaintiff on the main demand, and in favor of the defendant on her reconventional demand, awarding her alimony at the rate of $60 per month from the inception to the finality of the suit.

Both from the judgment decreeing the defendant a separation and that awarding her alimony, the plaintiff appeals.

During the course of the trial various witnesses were introduced and interrogated on the part of the plaintiff, for the double purpose, first, of proving the charges of adultery alleged against the defendant, as grounds for a divorce, and, second, of defeating the defendant's reconventional demand for a separation. But this testimony was objected to, and the objections were sustained and the testimony ruled out on the ground that same was inadmissible under the pleadings—neither of plaintiff's petitions containing any specification of adultery committed at the matrimonial domicil, rendering this fact susceptible of proof.

Plaintiff specially offered, in rebuttal of defendant's evidence, proof to the effect that the defendant was taken in the act of adultery in the common domicil; and further, to show that this was the cause of her abandoning the same; but the court sustained the defendant's objection thereto, on the ground that, in his opinion, the proof of *any* one act of adultery, for *any and all purposes of the case*, must be restricted to the allegations of the petition and supplemental petition.

Pretermitting an expression of opinion as to the correctness of the judge's ruling with regard to the admissibility *vel non* of this testimony, *quoad* the plaintiff's demand, we think it a self-evident proposition that it was admissible for the purpose of rebutting the defendant's evidence in support of her reconventional demand, and that it was error on the part of the judge in excluding it.

Answers to reconventional demands are not permissible in law, and consequently there could not be any *pleading* or demurrer on the part of plaintiff to the defendant's demand—such as is clearly contemplated by the judge's ruling—to render same admissible. And inasmuch as no answer to a reconventional demand is contemplated in law, it must be assumed that the plaintiff in the suit is considered to have denied and resisted such demand

On this hypothesis it is clear that the plaintiff was entitled to offer in rebuttal such evidence as would tend to defeat the defendant's reconventional demand without first making formal answer and denial of the allegations thereof.

Considering the particular averment of her demand, to the effect that the plaintiff had openly and publicly defamed her by the institution of this suit, founded upon charges of adultery, it would seem to be reasonable that the plaintiff should be afforded an opportunity of justifying against this charge of defamation by making proof, if he can, that she had been guilty of adulteries, in the common domicil, though this is not one of the particular charges on which he claims a divorce. And it seems reasonable that he should be allowed to make the proof that was objected to for the purpose of establishing *her abandonment* of the matrimonial domicil, thus rebutting her charge against *plaintiff of abandonment*, on account of which she alleges herself entitled to claim a separation from bed and board.

In such case as this—a double action for divorce and *per contra* of separation from bed and board—we consider it better practice to admit than to reject evidence that may shed light on the controversy. For this purpose, it is our opinion that the cause should be remanded to the court *a qua* with directions to admit the rejected testimony, in so far as same may have a bearing on the defendant's reconventional demand, and in keeping with the views herein expressed.

With respect to the allowance of alimony *vel non* the following provisions of the code are pertinent and controlling, to-wit:

"If the wife, who sues for a separation, has left or declared her intention to leave the dwelling of her husband, the judge shall assign the home wherein she shall be obliged to dwell until the determination of the suit.

"The wife shall be subject to prove her said residence as often as she may be required to do so, and in case she fails so to do, every proceeding on the separation shall be suspended." R. C. C. 147.

"If the wife has not sufficient income for her maintenance during the suit for separation, the judge shall allow her a sum for her support, proportioned to the means of the husband. The husband can not be compelled to pay this allowance unless the wife proves that she has constantly resided in the home appointed by the judge." R. C. C. 148.

Alimony is an incident of the wife's suit for separation; and it is

evident that same can not be allowed, except upon the terms of the code, to-wit: 1. That the wife shall have instituted suit for separation against her husband. 2. That she has either left or declared her intention to leave the dwelling of the husband. 3. That the judge shall have assigned her a home wherein she *shall be obliged to dwell* during the pendency of her suit.

Conceding then, for the purpose of the argument, that the wife's reconventional demand for a separation is such a *suit* as the law contemplates, the defendant is still confronted with the difficulty that the judge did not assign her a domicil for her occupancy during the pendency of same; and the law plainly and most emphatically declares that "the husband *can not be compelled to pay* this allowance unless the wife proves that she has constantly resided in the house appointed by the judge." *Id.* 148.

An examination of the case of D'Auvilliers vs. Her Husband, 32 An. 605, does not bear out the statement of defendant's counsel, that no domicil need be assigned to the wife when she is defendant in a suit for separation or divorce; and it could not have been so decided, for the reason that the wife was plaintiff claiming a divorce.

That no domicil had been assigned to the wife, under R. C. C. 147, was matter of exception by the defendant husband, but it did not prevail, because the court was of opinion that "this article has no application to a case like the instant one, when "*the spouses were residing in the home of the wife's parents in a foreign country*, and the husband had abandoned her and eloped with a concubine." (Our italics).

In that case there was no matrimonial domicil from which the complaining wife had elected to depart. And it is upon such an election alone, by the terms of the Code, that the judge is authorized to make the assignment. *Id.* 147.

Defendant's counsel is under a misapprehension of fact in making the statement that the court awarded alimony in Lauber vs. Mast, 15 An. 593, although it does not appear that a domicil had been assigned the wife, as it appears that the court predicated its opinion on the authority of Rowley vs. Rowley, 19 La. 557, in which an assignment of a domicil had been made on the wife's application as the plaintiff.

The State vs. Judge, 22 An. 264, only decides that the respondent had jurisdiction to entertain and award alimony subsequent to judg-

ment and during the pendency of a suspensive appeal, for the reason that the plaintiff had made application therefor in her original petition, and it had been inadvertently overlooked at the time of decision.

These are all the decisions to which counsel have cited us as favoring the allowance of alimony, in the absence of an order of the judge assigning the wife a domicil *pendente lite*, and we are confident they do not support that contention.

In answer to the contention that the husband owes to his wife support and assistance, and "is bound to furnish her with whatever is required for the convenience of life," it is sufficient to say that those are among the obligations that the law imposes under the title of "Husband and Wife." R. C. C. 119, 120.

But they are not actionable during the existence of the marriage, and can only be enforced *after* the marriage has been dissolved. They are treated of under the title of "Separation of Property" and can only be recovered after the wife has obtained a divorce; for the code says:

"If the wife *who has obtained the divorce* has not sufficient means for her maintenance, the court may allow her, in its discretion, out of the property of her husband, alimony which shall not exceed one-third of his income." R. C. C. 160.

It is evident that this species of alimony—for the *maintenance* of a *divorced wife*—is an incident of the settlement of the matrimonial community, and is only recoverable after a decree of separation has been pronounced.

Prior to the passage of Act No. 307 of 1855, since incorporated in the Revised Code of 1870 as Art. 160, no allowance of *such* alimony could be awarded *after* a decree of divorce had been rendered.

But the alimony we have under consideration is, by the terms of the law, for the wife's maintenance "during the suit for separation."

It was of this kind of alimony that the court treated in Holbrook vs. Holbrook, 32 An. 13, and of which they said:

"The demand for alimony by the wife against her husband is an incident of the suit for separation, or divorce—is accessory to it, and inseparable from it. An order or judgment for alimony is made pending such suit. * * * * *

"An allowance for alimony is always made *pendente lite* and is not

conditioned on the success of the principal demand. LeBeau vs. Trudeau, 1 N. S. 93; Rowley vs. Rowley, 19 La. 557."

That decision is in keeping with Heyob vs. Her Husband, 18 An. 41, and Moore vs. Moore, 18 An. 613, and they are bottomed on C. P. 105, which declares that "a married woman can not sue her husband so long as the marriage continues," otherwise than in the exceptional cases mentioned therein.

Our conclusion is that the defendant's claim is of the latter class, and does not include her right to demand assistance and support for which her right of action can only arise subsequent to the dissolution of the marriage. And restricting the issue to alimony *vel non*, *pendente lite*, we are of opinion that the plaintiff can not be compelled to pay this allowance if the record discloses that no domicil has been assigned the wife *pendente lite*, as the evident object of the law is to provide her the means of maintaining a separate domicil "during the suit for separation," the selection of which the suit renders necessary.

Inasmuch as the defendant confessedly left the domicil of her husband without obtaining from the judge an order assigning her a domicil pending her suit, it was manifestly impossible for her to make the proof required of her, as a condition precedent to her recovery of alimony against the plaintiff.

It is of no consequence that the plaintiff did not urge formal exception or objection on this score *in limine;* the phraseology of the statute clearly imposes the burden of proof on the defendant to establish this essential ingredient of her demand, and the plaintiff had a perfect right to rely upon her failure to discharge it, as a substantial defence, to the effect that he *could not* be compelled to pay this allowance otherwise.

On the state of the controversy thus formulated, we think the defendant's reconventional demand for alimony should be disallowed and rejected.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the judgment rejecting the plaintiff's demand for divorce be and the same is affirmed; that the defendant's reconventional demand for *alimony* be rejected and disallowed; and that the cause be remanded to the court *a qua* for the purpose of allowing the plaintiff to introduce the rejected testimony of witnesses

offered for the purpose of rebutting the defendant's reconventional demand for separation, in keeping with the views herein expressed, and for further proceedings according to law.

It is further ordered, adjudged and decreed that the defendant and appellee be taxed with the costs of appeal, and that all other costs await the final judgment in the cause.

No. 11,305.

SUCCESSION OF WILLIAM MASSEY.

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When a testator directs in his will that his immovable property be sold by his executor, an order of sale rendered thereon for the sale of the property is valid.

If the executor dies pending the proceedings for the sale, his death does not have the effect of annulling the order or arresting the sale.

It is the law that an executor's authority is confined to the execution of the will, and that he can only sell property, movables first and thereafter immovables, in default of funds to pay debts and legacies. But the code, Art. 1669, makes an exception when the exeeutor is directed to sell immovable property by the will.

The rights of the widow in community and the heirs of age are fixed at the testator's death, and these rights are personal to them. If they make no objection to the sale of the property directed by the will, the adjudicatee has no cause of complaint. They waive their personal rights by making no opposition to the execution of the will, and the order of sale by the court is a complete protection of the adjudicatee's title.

The adjudication by the auctioneer of the property to the purchaser is a complete title. No other is necessary and essential to vest title in the adjudicatee. The auctioneer who made the sale can make the deed and receive the price if no opposition is made by the executor, or in his absence.

The fact that there is no one to receive the price can not annul the adjudication. The purchaser can retain the price until some one is authorized to demand it or he can relieve himself of responsibility by depositing same in court.

APPEAL from the Civil District Court, Parish of Orleans.
King, J.

Guy M. Hornor for the Appellees:

When a testator directs his executor in his will to sell all his property, an order of sale obtained by the executor in order to carry out the wishes of the testator is valid. C. C. 1669.

"When the highest price offered has been cried long enough to make it probable that no higher will be offered, he who has made the offer is publicly declared to be the purchaser, and the thing sold is adjudicated to him." C. C. 2607.

"This adjudication is the completion of the sale; the purchaser becomes owner of the article adjudged, and the contract is from that time subjected to the same rules which govern the ordinary contract of sale." C. C. 2608; Lane vs. Cameron, 36 An. 773.

"When an auctioneer, who has been appointed to make a judicial sale, has made the adjudication and executed his *proces verbal* of sale, and has died before passing the act of sale, the court may appoint a new auctioneer to take his place." Covas vs. Berthoulin, 45 An. 160.

Therefore an auctioneer directed to make a judicial sale has the power to sign the act of sale in accordance with the adjudication made by him.

"The adjudication made and recorded by the sheriff, auctioneer or representative of the succession, is a complete title to the purchaser, and need not be followed by an act passed before a notary." C. C. 2623; Berthoud's Heirs vs. Unruh, 9 La. 180; Nesom vs. Weiss et al., 34 An. 1009, and authorities there cited.

Browne & Choate contra:

1. Any clause in a will, extending an executor's powers beyond those conferred by law, is considered not written. C. C. 1652, 53, 59, 61; Percy vs. Provan, 15 La. R., page 69
2. The functions of an executor do not extend beyond the execution of the will, embracing the payment of legacies, if any are left by the will, and the payment of the debts of the testator, and those of his estate. For these purposes he can procure an order of sale and have sufficient property sold to satisfy the legacies and debts. He has no power to obtain an order of sale for the purpose of making a partition of the estate between the heirs. Succession of Dumestre, 4 So. Rep , page 329. And it follows that a probate court has no power to grant an order of sale upon the application of an executor to partition an estate between the heirs.

The opinion of the court was delivered by

McENERY, J. Wm. Massey died in the city of Philadelphia in 1891. Joseph P. Hornor, of the city of New Orleans, was appointed by the last will and testament of the deceased, executor in Louisiana. The testator owned considerable immovable property in the city of New Orleans.

In the will he directed the Louisiana executor "to sell all the property of the deceased within the State of Louisiana under the orders of the Court of Probate and advice of my Pennsylvania executors, and after payment of all my debts, if any, to remit the proceeds to the executors of my estate in Pennsylvania, my domicil."

Joseph P. Hornor, the Louisiana executor, presented to the proper court having jurisdiction, a petition in which he alleged that the deceased by last will dated 26th April, 1881, directed him to sell the property of the deceased in this State under the orders of court, and the advice of the Pennsylvania executors, and to remit the proceeds to the executors in Pennsylvania, and that he was advised to sell the real estate at public auction. The order was granted as prayed for, and an order issued to W. C. H. Robinson, an auctioneer, direct-

ing him to make the sale, after legal delays and advertisement, and upon the terms and conditions as prayed for by the executor. The sale was advertised to take place on 1st February, 1893. Before the day of sale arrived the Louisiana executor, Hornor, died. The auctioneer proceeded with the advertisement and sale, and on the day of sale adjudicated a certain piece of real estate, situated in the city of New Orleans, in the square bounded by Magazine, Lafayette, Common and Girod streets, to the commercial firm of W. H. Mathews & Bro., for the price of $21,000. The auctioneer made a tender of title to said firm of an act of sale signed by him, and made a demand on them for the price of the adjudication. They refused to comply with their bid. A rule was then taken by the auctioneer and the heirs of deceased on Mathews & Bro., the adjudicatees, to show cause why they should not accept the title tendered and pay the purchase price.

The defendant in rule answered by attacking the validity of the proceedings provoked by the executor upon the following grounds:

1. Because the said property was sold without authority in law, or in fact, and the proceedings looking to the sale of said property are wholly unwarranted in law, and they are null and void on their face.

2. Because the District Court was without authority or power to issue the order of sale herein for the sale of said property.

3. Because there is no one at present qualified to receive the purchase price herein and grant a valid discharge therefor, and make to these respondents a formal and valid title to said property.

4. Because the said proceedings are in effect partition proceedings and the proper parties, the widow and heirs, have not been brought into court, and they are not bound thereby.

5. Because the said proceedings are otherwise defective, illegal and not binding on the heirs of the deceased.

The rule was made absolute, and W. H. Mathews & Bro. were ordered to accept title and pay the price of the adjudication. They appealed from the judgment.

The first and second grounds are based on the well established principle that the executor was without power to enlarge the duties imposed upon him by the laws of this State, and that he could only sell enough property to pay debts and legacies and that the record shows that the estate owed no debts and there were no legacies to be paid. And he relies upon Articles 1659, 1660, 1668, C. C., and Percy vs. Provan, 15 La. 69, and Succession of Dumestre, 40 An. 571.

Art. 1660 says: "But if the executor testamentary be merely appointed testamentary executor without any other power his functions are confined to see to the execution of the legacies contained in the will, and to cause the inventory and other conservatory acts of the property of the succession to be made."

In default of funds to discharge debts and legacies of sums of money he can sell, on the order of court, the movables, and if they are insufficient the immovables to a sufficient amount to satisfy said debts and legacies. Art. 1668.

Art. 1669 says: "Except in the cases provided for in the preceding article (1668) the executor can not cause the immovables to be sold unless he is authorized by the will to do so."

The executor is bound to see that the will is faithfully executed. C. C., Art. 1672.

Article 1669 authorizes the immovables to be sold if so directed by the will.

The testator in the will expressly directed that the property in Louisiana should be sold and the proceeds remitted to the executors in Pennsylvania. The sale of the immovables in Louisiana was to be made on the advice of the executors in Pennsylvania. This disposition of the will evidently intended that the executors in Pennsylvania should be the judges of the proper time for the sale. They directed it, and the condition became absolute, and it then became the duty of the Louisiana executor to apply to the proper court for the requisite order to sell.

The right of the widow in community on the property, her ownership of one-half and usufruct on the other, could not be controlled by the dispositions in the will. And the same may be said of the rights of the heirs on the property, which were fixed at the testator's death. Succession of Smith, 9 An. 107.

The widow and the heirs assert no rights on the property—we are not informed by the record that they have done so.

At any rate they must assert them before the final execution of the testament. In the instant case in the rule they demand the execution of the will.

The matter is personal to them, and if they waive their rights by not opposing the execution of the will it does not concern the adjudicatee of the property. There are no minor heirs' rights at issue.

The testator ordered the sale of his property, the proceeds to be

remitted to the executors of his domicil. The will is executed, the property sold and proceeds remitted to the executors at the testator's domicil. Now in what manner, after the sale of the property, can the heirs or widow attack the sale made of the property by a court of competent jurisdiction? They have acquiesced in it by making no opposition to the execution of the will. The fact that the code authorizes the testamentary executor to sell immovable property, if directed by the will to do so, is a protection to the adjudicatee in the absence of any proceedings by the heirs or widow in community to prevent the sale.

The authority of the executor to sell was derived from the will. The will was probated and ordered executed. The order of the court ordering the sale of the property is a protection to the adjudicatee.

There is nothing in the record behind the order to put the adjudicatee upon inquiry. In the absence of any opposition to the final execution of the will, the order to sell stands alone a complete and perfect shield for the purchaser under the order.

On the third ground, alleged by defendants in rule, that there is no one at present qualified to receive the purchase price and grant a valid discharge therefor and make to defendants a valid title to said property, it is sufficient to say that the death of the executor before the sale could not have the effect of revoking the order of court. The property was directly under the administration of the court, under the order, and it could compel the final execution of the order. The court had appointed the auctioneer to make the sale and the announcement or advertisement of the same had been made to take place on a certain day. There was no reason why the death of the executor should arrest the execution of the order. Having provoked the order as required by the will, his active participation was no longer necessary for its final execution.

The adjudication of the property to the defendants was in itself a perfect title. There was no necessity for any other. C. C. 2607, 2608, 2623; Lane vs. Cameron, 36 An. 773; Dabadie vs. Poydras, 3 An. 153; Heirs of Nesom vs. Weis, 34 An. 1009; Washburn vs. Green, 13 An. 332; Desobry vs. Carmena, 9 An. 180; Babin vs. Winchester, 7 La. 468; Faulk vs. Pinnell, 6 R. 26; Lafiton vs. Doiron, 12 An. 164; Code of Practice, 690; Interdiction of Onorato, 46 An. *ante.*, p. 73, recently decided.

There being no one to whom he could pay the price could not defeat the sale. The purchaser could retain it until demanded by proper party, or he could have relieved himself of responsibility by depositing same in court.

The auctioneer Robinson had the undoubted right to make a deed to the property and to receive the price, as he had been authorized by the court to make the sale.

In Covas vs. Bertoulin, 45 An., p. 160, we decided that where the auctioneer who made the sale died, the court could appoint another auctioneer to make the deed. It is self-evident, then, that the auctioneer who is living has the right to sign the act of sale.

On the fourth ground, that the proceedings were, in effect, partition proceedings, and the widow and heirs were not parties, and the act therefore null and void, it is evident that the sale was not made to effect a partition between co-proprietors, but to reduce to cash the testator's property in Louisiana under the provisions of the will.

The sale may be a preliminary step to a final partition in Pennsylvania among the heirs of the deceased. This may have been the reason for the disposition in the will for the sale of the immovable property in Louisiana. But these are subsequent matters that do not concern the defendants. Dees vs. Tildon, 2 An. 412; Kohn vs. Marsh, 3 Rob. 48.

Judgment affirmed.

Mr. Justice Parlange takes no part in the decision of this case.

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No. 11,355.

STATE OF LOUISIANA VS. J. ECKENDORF.

A person engaged in the trade, business or calling of baking bread, in which he exclusively deals, is not a manufacturer in the sense of Art. 206 of the Constitution, and is not entitled to constitutional immunity from the payment of a license tax.

APPEAL from the Second City Court of New Orleans.
Morel, J.

E. H. McCaleb Jr., and *John St. Paul* for Plaintiff and Appellant.

Defendant unrepresented.

The opinion of the court was delivered by

WATKINS, J. This is a proceeding by rule, taken on the part of the tax collector of the second district of the City of New Orleans against the defendant, to compel him to show cause why he should not pay a license of $50 to the State for the privilege of conducting the business of a bakery, or retail dealer, the gross receipts of which exceed the sum of $5000 annually; and also for interest at the rate of 2 per cent. per month from and after the 1st of March, 1893; and 5 per cent. attorney's fees.

The respondent appeared and answered that he was a manufacturer and a mechanic, dealing exclusively in his own wares, and is therefore exempt from the payment of a license under Art. 206 of the Constitution.

The evidence is that the respondent is a baker and sells *only* the bread of his own bake. That bread is made from flour, the dough being prepared from yeast and salt and required an experienced hand to bake it properly.

In the court below there was judgment in favor of the defendant, sustaining his exemption from paying license as a manufacturer of bread, and the plaintiff has appealed.

It is difficult for us to perceive the ground for such a contention as that of the respondent, or the opinion of the judge *a quo*.

The Constitution declares that "all persons * * pursuing any trade, profession, business or calling, may be rendered liable to such tax," except "those engaged in mechanical pursuits" * * and "*manufacturers* other than those of distilled, alcoholic or malt liquors." Art. 206.

Is the defendant in rule entitled to exemption on the ground that he is a manufacturer of bread?

The general rule, one always observed by courts of justice in construing exemptions of persons or property from taxation, is that the party claiming the benefit of such exemption must bring himself within its plain and evident intendment, otherwise his liability to the license or tax will be maintained and enforced.

In City vs. Mannessier, 32 An. 1075, we said that "we can not assent to the proposition that a person making and selling ice cream is a manufacturer in the sense of the law, or in any other sense of the word."

The process of making and baking bread can not be possibly distinguished from that of making ice cream.

For the purpose of fully illustrating our views in this respect, the cases of City vs. LeBlanc, 35 An. 747; City vs. Ernst, 34 An. 597; and State vs. Dupre, 42 An. 561, may be considered.

The principles of the Mannessier case were examined and approved in the case of City vs. New Orleans Coffee Company, Limited, 46 An. *ante.*, p. 87.

The judgment appealed from should be reversed and the plaintiff's rule made absolute.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the plaintiff's rule be made absolute at the cost of respondent in both courts.

No. 11,349.

STATE EX REL. D. GEORGE HUMPHREYS ET AL. VS. G. A. RICHARDSON ET ALS.

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Where the issue in a case is not the right of ownership of specific property, but of the possession thereof, it is the value of the latter right which determines the jurisdiction on appeal of the Supreme Court.

APPLICATION for *Certiorari.*

Wade R. Young for the Relator.

John B. Stone and *W. M. Murphy* for the Respondents:

Relators voluntarily submitted to the jurisdiction of the Court of Appeals and made no exception thereto; this court will refuse to inquire into the question of jurisdiction of the Court of Appeals, where relators have not first excepted thereto without avail. State ex rel. Steele, 38 An. 569; C. P. 847; 10 Rob. 169; 29 An. 806; 37 An. 845; C. P. 846, 849; State ex rel. vs. Shakespeare, 40 An. 608, in which the court held: "The cases in which this has been held are so numerous that it would be cumbersome to enumerate them all." Citing 29 An. 306; 37 An. 845; 38 An. 569, 920.

In a suit where the plaintiff claims a certain amount or a thing of a certain value, and the defendant in his answer admits owing or confesses judgment for a part of the thing or amount claimed the amount in dispute will be the difference between the sum or value claimed, and the sum or value admitted or confessed, or disclaimed. 32 An. 930; 33 An. 1089; 35 An. 346; 26 An. 291.

The opinion of the court was delivered by

NICHOLLS, C. J. Relators aver that they own and possess a certain cotton plantation described in their petition, known as the Dalkeith

plantation, situated in Madison parish, and that G. A. Richardson owned and possessed the Maryland plantation which adjoined the same. That in June, 1892, having reason to believe that Richardson had trespassed and taken possession of a part of the lands of the Dalkeith plantation and was cultivating the same, they instituted an action of boundary against him in the District Court of Madison to have the limits of their respective plantations fixed. That defendant, though cited, allowed said action to go by default, and in a survey made under the order of the court, about October, 1892, it was shown that he had trespassed and taken possession of a certain part of the lands of said Dalkeith plantation. That though notified by said survey that he had trespassed on the lands of relators, and was not within the limits of the Maryland plantation as described in his deed, he retained the possession of said lands and refused to surrender the possession of the same to relators, falsely pretending that he and his authors had acquired said lands by the prescription of thirty years. That relators were thus forced to institute a petitory action against him to be recognized as owners and put in possession of said land, and about December, 1892, filed their petition in which they claimed the ownership and possession of said lands of the value of twenty-five hundred dollars, and revenues for the year 1892 to the amount of about two hundred and fifty dollars. That said petition was duly filed and served and defendant was cited to answer, and the testimony of John Balfour, the husband of one of the authors of his title, taken in pursuance of a commission as to the character of the possession of the defendant and his authors of said lands. That it was disclosed by the testimony of said Balfour that the possession of his said wife had been permissive and with the consent and knowledge of the owners of the Dalkeith plantation, and that there was no adverse possession to serve as a foundation for the prescription of thirty years set up by defendant.

That the defendant, upon the publication of that testimony, abandoned his claim to the ownership of said lands and filed an answer to the petition at the January term, 1893, in which he disclaimed title to said lands but claimed to have been a possessor in good faith and not liable to account for revenues, and reconvened for compensation for improvements and ameliorations.

That the action was consolidated with the action of boundary standing on default, and, after trial had and evidence adduced, the

district judge rendered judgment homologating the report of the surveyor, fixing the limits between the respective plantations, recognizing the plaintiff as the owner of the lands in controversy and entitled to the possession thereof, and condemning defendant as a possessor in bad faith to account for the revenues for the year 1892 to the amount of about $250, and to remove, (as elected by the plaintiff), the building erected by him on the lands, and rejected his claim for ameliorations, inseparable in their nature from the soil, and condemned him to pay all the costs of both suits. That defendant took a suspensive appeal from said judgment, returnable to the Circuit Court of Appeals for the Second Circuit, at its October term, 1893, and counsel for petitioners having through error believed the appeal to be within the jurisdiction of said court, and said court having inadvertently overlooked the fact that the appeal could only be taken to the Supreme Court, assumed jurisdiction and reversed the judgment of the District Court, found defendant to have been a possessor in good faith and not liable for revenues, and condemned plaintiffs to pay him one hundred and fifty dollars for the building erected by him on the land, and to pay one-half the costs of the action of boundary. That a petition for rehearing was filed and the rehearing denied, and said judgment and decree have become final, and the term adjourned. That they have been advised since the adjournment of said court that its judgment and decree reversing the judgment of the District Court is absolutely null and void and of no effect for want of jurisdiction *ratione materiæ*, and that the judgment of the District Court, so attempted to be reversed, is still of full force and effect until reversed by the Supreme Court. That they have been advised that the Supreme Court, under Articles 864 and 865 of the Code of Practice, has denied the writ of *certiorari* to the courts of original jurisdiction unless there has been an exception or some form of objection to the jurisdiction of the court presented, and acted on by said court, but they have also been advised that it has uniformly held that neither consent nor neglect of parties can absolve the court from their duty to obey the Constitution. That the judgment of a court which lacks jurisdiction *ratione materiæ* is an absolute nullity which can not be sanctioned by the ignorance of parties or neglect to object to the jurisdiction, nor by the error or inadvertence of the judge in usurping jurisdiction, and that as the District Court is without jurisdiction to entertain a de-

mand for the nullity of the judgment of the Circuit Court of Appeals, relators can only have relief by the writ of *certiorari* from the Supreme Court.

That if the failure of their counsel to object to the jurisdiction of the Court of Appeals was to sanction the proceedings complained of, such sanction was given in error and ought not to deprive relators of their constitutional right to have the judgment of the District Court reviewed by the Supreme Court, and by that court only. In view of the premises relators prayed for a writ of *certiorari*, directed to the judges of the Circuit Court of Appeals for the Second Circuit, commanding them to send up a copy of the proceedings in the suit of D. George Humphreys et al. vs. G. A. Richardson, to the end that their validity may be ascertained and that the execution of the judgment of the Court of Appeals against relators be arrested by enjoining G. A. Richardson from proceeding further until the validity of the proceedings has been pronounced upon, and that the Supreme Court would avoid the proceedings in said suit in the Circuit Court of Appeals and direct the judges of said court to dismiss the appeal in said suit for want of jurisdiction *ratione materiæ*.

An alternative writ having been issued E. C. Montgomery, one of the judges of the Court of Appeals, filed an answer, accompanied by a certified copy of the record of the proceedings referred to.

The answer declares that the Circuit Court was vested with and properly exercised jurisdiction of said appeal for the reason that the amount in dispute, as shown by the pleadings, was less than two thousand dollars (Articles 81 and 95 of the Constitution). That the boundary suit and the petitory action in the District Court alluded to, were there consolidated after the answer in the petitory action was filed, and one judgment was rendered in the consolidated cases, and from this judgment G. A. Richardson (defendant therein) appealed to the Second Circuit Court. That on October 23, 1893, the plaintiff (relator herein) filed an answer to this appeal, praying an amendment and affirmance of the judgment appealed from. That no plea to the jurisdiction of the Circuit Court was filed.

That after judgment was rendered by the Circuit Court the plaintiff applied for a rehearing, but did not question the jurisdiction of the Circuit Court.

That in the boundary suit (suit No. 993) plaintiffs alleged their interest in fixing the boundaries to be one thousand dollars. That defendant filed no answer in that suit.

That the petitory action (suit No. 1025) was for lands claimed to be worth twenty-five hundred dollars and one year's revenue, three hundred and fifty dollars. That the answer in that suit admitted plaintiff's ownership and right to the land, and admitted that defendant had possession of and cultivated, in 1892, twenty-five acres of the land claimed, and that believing the land to be a part of the Maryland plantation and his property he had made valuable improvements on it, and claimed three hundred and twenty-five dollars for improvements. That the fact that land alleged to be worth twenty-five hundred doliars was *claimed* in that suit was apparent, but that it was equally apparent that defendant admitted plaintiffs' ownership, and the only amount in *dispute* was plaintiff's claim for revenues, three hundred and fifty dollars, and defendant's claim for improvements, three hundred and twenty-five dollars, and that on the authority of repeated decisions the Circuit Court entertained jurisdiction of the appeal for the reason that the amount actually in dispute was less than two thousand dollars.

The initial proceeding in the District Court was one of boundary between the relators and G. A. Richardson, in which they declared that their interest in fixing the boundaries was one thousand dollars. This was followed some time after by what is referred to as a petitory action, which, on subsequent motion of the plaintiffs, was consolidated with the boundary suit and the two tried together and disposed of by a single judgment. The defendant filed his answer after the consolidation. As the pleadings in the second case, so far as they have a bearing on the question before us, are short, we think that by transcribing them we will more clearly than in any other way show its character and the legal situation of the parties.

In their petition in the second proceeding relators say "they are the plaintiffs to the suit now pending on the docket entitled D. George Humphreys *et al.* vs. G. A. Richardson, in which they demanded a fixing of the bounds between the Dalkeith plantation of petitioners and the Maryland and Hermion plantations of Richardson. That the report of the surveyor, which has been returned, has disclosed that Richardson has possession or claims to have possession of a part of the land within the limits of the Dalkeith plantation, being parts of the N. W. quarter and the S. E. quarter of Section —, in T. 16, R. 13 E., lying south of the lake and slough running through said quarter sections and between said lake and

slough and the Maryland plantation, of the value of two thousand five hundred dollars; that Richardson does not oppose the homologation of the report of the surveyor, but asserts title to said land and refuses to surrender possession to petitioners, and is receiving the rents, of the value of three hundred and fifty dollars per year; wherefore they pray that said Richardson be cited to answer this demand and to disclaim the possession so asserted, or to disclose the title by which he claims the lands, and that petitioners be recognized as the owners thereof and put into possession and recover the rents, of the value of three hundred and fifty dollars per year, from January 1, 1892, and for general relief and costs. That petition was filed January 6, 1893.

On the 24th January, 1893, defendant filed his answer, which was as follows:

"Now comes G. A. Richardson, defendant herein, and for answer disclaims that he is the owner or possessor of the land sued for except about twenty-five acres of land in the N. W. quarter of Section (1) one, which he cultivated by leasing out during the year 1892, believing at the time that it formed a part of the Maryland plantation, owned by respondent, which it adjoined. That when respondent became the purchaser of said Maryland plantation he believed that said twenty-five acres belonged to and formed a part of said plantation, but has recently discovered that he was in error in so believing. That in good faith believing that he was the owner of said twenty-five acres he has placed thereon one house at a cost of $175, which has benefited said land and enhanced its value to said extent, and is worth said sum. That said twenty-five acres of land was grown up with bushes and undergrowth so that respondent had to clear up same at a cost of $150 before he was able to cultivate same in 1892, which cutting has benefited the land and enhanced its value to said extent, and that the condition of said land, by reason of having been so recently cleared, in 1892, was such that respondent was able to rent same for only a nominal rent, realizing much less therefor than it cost him to put it in a state of cultivation. Respondent prays that plaintiffs' demand for revenues be rejected and that he have judgment in reconvention against them for the value of said house, or permitting him to remove same, and for judgment for the sum of one hundred and fifty dollars, cost and value of clearing said land, being the amount of its enhanced value, and for costs and full and equitable relief."

On 13th April, 1893, plaintiffs filed in court a paper in which they declare that "they tender to the defendant the right to remove the building claimed to be erected by him on the land of plaintiffs, and for which he seeks to claim, in reconvention, $175 on account of its enhancing the value of the soil, and consent to relinquish all their right accorded them by law of retaining the said property (cabin) on reimbursing its relative value to the land, and consent to the removal of the same off their land, and pray that such may be so ordered."

On the 14th April, 1893, the District Court rendered a judgment as follows:

"These two consolidated cases being regularly fixed for trial and taken up and tried, and the law and the evidence being in favor of plaintiffs in the case No. 993 and the judgment by default rendered in said case No. 993 not being set aside after the lapse of two judicial days, and the defendant having failed to answer, and the plaintiffs having proved their demand, it is ordered, adjudged and decreed that there be judgment homologating and approving the survey made by the parish surveyor as shown by his plat and *proces verbal* of said survey herein filed, and fixing the bounds between the property as therein stated. It is ordered that said plat of the said survey be made a part of this judgment. It is also ordered and decreed that the defendant, Richardson, pay all costs of said suit No. 993.

"And by reason of the issue joined in case No. 1025 by the defendant, and the law and the evidence being in plaintiffs' favor, and said case being regularly tried on said issue, it is ordered, adjudged and decreed that plaintiffs have judgment recognizing them as the owners of the land described in his petition and herein sued for, being part of N. W. quarter and S. E. quarter of Section 1, in T. 16, R. 13 E., lying south and west of the lake and slough running through said quarter section as shown by the plat aforesaid, and that they be quieted in their title and possession thereof. It is also ordered that plaintiffs do have and recover of the said defendant two hundred and thirty-one dollars on account of the revenues of said property for the year 1892. It is further ordered and decreed that the demand of the defendant for compensation on account of clearing the land be rejected at his cost, and it appearing that the plaintiffs have elected to not retain the cabin built upon said land it is ordered and decreed that the defendant remove the same off said land.

slough and the Maryland plantation, of the value of two thousand five hundred dollars; that Richardson does not oppose the homologation of the report of the surveyor, but asserts title to said land and refuses to surrender possession to petitioners, and is receiving the rents, of the value of three hundred and fifty dollars per year; wherefore they pray that said Richardson be cited to answer this demand and to disclaim the possession so asserted, or to disclose the title by which he claims the lands, and that petitioners be recognized as the owners thereof and put into possession and recover the rents, of the value of three hundred and fifty dollars per year, from January 1, 1892, and for general relief and costs. That petition was filed January 6, 1893.

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"And by reason of the issue joined in case No. 1025 by the defendant, and the law and the evidence being in plaintiffs' favor, and said case being regularly tried on said issue, it is ordered, adjudged and decreed that plaintiffs have judgment recognizing them as the owners of the land described in his petition and herein sued for, being part of N. W. quarter and S. E. quarter of Section 1, in T. 16, R. 13 E., lying south and west of the lake and slough running through said quarter section as shown by the plat aforesaid, and that they be quieted in their title and possession thereof. It is also ordered that plaintiffs do have and recover of the said defendant two hundred and thirty-one dollars on account of the revenues of said property for the year 1892. It is further ordered and decreed that the demand of the defendant for compensation on account of clearing the land be rejected at his cost, and it appearing that the plaintiffs have elected to not retain the cabin built upon said land it is ordered and decreed that the defendant remove the same off said land.

"It is ordered that the defendant pay costs of suit No. 1025. In the matter of the taxing of the surveyor's costs on the rule filed by the plaintiffs (except as to the sum of $50, proved to have been paid by plaintiffs, which is here taxed), it is ordered that the balance of costs be left open for further trial of said rule."

The defendant made two motions for a suspensive appeal from this judgment and obtained two orders of appeal—one returnable to the Circuit Court, the other to the Supreme Court, and furnished bond and security under both orders, The transcript, however, was lodged in the Circuit Court. The appellees appeared in that court and filed an answer praying an affirmance of the judgment, but amended so as to allow fifty dollars for the fees of Searles, surveyor and civil engineer, as an expert, as prayed for by the plaintiffs.

The Circuit Court ordered that the judgment in suit No. 993 be amended by decreeing that plaintiffs and defendant pay costs of said suit (including the cost of survey) equally, and that the judgment in suit No. 1025 be amended by rejecting plaintiffs' demand for rents and for the removal of the tenant house, and decreed that the defendant recover of plaintiffs on his reconventional demand the sum of one hundred and fifty dollars, value of material or workmanship (or enhanced value of the soil). It is further ordered that in other respects the judgment appealed from stand affirmed; defendant to pay costs of suit No. 1025 in the District Court and plaintiffs to pay the costs of appeal.

Relators made an unsuccessful application for a rehearing.

The present application followed.

From an examination of the pleadings in the second proceeding it appears that whilst relators anticipated the possibility that the defendant Richardson might contest the ownership of the tract of land of which they alleged him to be in possession, they were by no means certain of the position he would take in the event of a suit, or certain what would be the issues to which such a suit would give rise. Their petition was tentative in its character, though its ultimate prayer was that they be recognized as owners of the land; that they be put in possession and that they recover the rents of the value of $350 per year from January 1, 1892. The defendant upon coming into court at once declined the issue of ownership which they tendered, which, if accepted, would have made the action petitory. He admitted that through error he was in possession of twenty-five acres of the tract, but he averred that his possession

was in good faith. In view of that fact he reconvened, praying for judgment for one hundred and seventy-five dollars to cover expenses which he had incurred in clearing the land and for one hundred and fifty dollars, the value of a cabin which he had built upon it. He did not assert a right to detain the property until this amount should be paid him. The district judge in his judgment says the case was tried upon the issue joined, which evidently did not involve the question of ownership. The allegation therefore that the value of the tract in question was twenty-five hundred dollars ceased to be material as a test of jurisdiction.

The only question between the parties relates to possession and the incidental rights of the plaintiffs and the defendant arising therefrom under the state of facts pleaded and disclosed. Relators themselves fixed the value of possession at three hundred and fifty dollars per year. They obtained judgment for that sum as the amount due them, and on appeal they prayed, so far as that question was concerned, that the judgment appealed from should be affirmed. We have recently had occasion to refer to the difference as affecting the question of jurisdiction between the value of the ownership of a thing and the value of the possession of the same thing. *In re* Genella, 46 An., *post.*

The course pursued by the relators in the Circuit Court showed a correct appreciation of the issues involved in the case and the value of the "matters in dispute." Whether we consider the two proceedings separately or together, the matters in dispute were clearly within the appellate jurisdiction of the Circuit Court of Appeals.

For the reasons herein assigned, it is ordered, adjudged and decreed that the orders and writ hereinbefore issued be set aside, and that the petition for the nullity of the proceedings be refused at relators' costs.

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No. 11,324.

W. R. ARCHER ET ALS. VS. ADRIEN GONSOULIN.

In this case, whether the appeal be considered as returnable in Opelousas at the term held in July, 1893, or in New Orleans at the term beginning in November, 1892, the appeal should be dismissed.

APPEAL from the Nineteenth District Court, Parish of Iberia. *Mouton, J.*

Foster & Broussard for Defendant and Appellee.

Philip H. Mentz and *G. L. Hall* for Plaintiffs and Appellants.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

PARLANGE, J. The judgment appealed from was rendered in May, 1892. The appeal was returnable to this court at its session held in Opelousas, and beginning on July 5, 1892. The appellants moved for an extension of time to file the transcript until the next session of this court at Opelousas in July, 1893. This motion was granted, although it was vigorously resisted by the appellee. After the extension had been granted, counsel for all the parties, averring that it was important to all the parties that the suit be finally determined as early as possible, joined in an application to this court, praying that the cause be made returnable at the next term of this court at New Orleans, which application was granted on July 8, 1892, and the order granting the same was duly entered on the minutes.

The transcript was not filed at the term beginning in November, 1892.

This court convened again at Opelousas on July 3, 1893. The transcript was filed at Opelousas on July 5, 1893. Thereafter the transcript was filed in New Orleans on August 11, 1893. The appellee has moved to dismiss the appeal.

Appellants' counsel states in an affidavit that in October, 1892, he wrote to the clerk of this court at Opelousas in regard to this case, and that the clerk in his reply stated that there was no order granted by this court transferring this case to New Orleans. In his letter to the clerk, appellants' counsel wrote that he was quite sure that there was such an order; that it was applied for by counsel for both sides jointly; that he knew that he and the opposite counsel signed the motion and read it in open court, and that the court granted the same, but that he did not know whether the clerk had taken it down. The clerk states in an affidavit that as appellants' counsel wrote that he knew that the motion was read in open court and that the same was granted, he understood that the inquiry of appellants' counsel was whether a written order had been endorsed by the court on the paper containing the motion for the transfer.

One of appellee's counsel has filed an affidavit in which, among other things, he states that he knew that the transcript was ready before the convening of this court in November, 1892; that after this court had been in session for a few weeks during its term beginning in November, 1892, he met appellants' counsel and reminded him of the transfer of the cause to New Orleans; that appellants' counsel said that he had been informed that there was no order to transfer; that affiant then said that if the order had not been taken down at Opelousas he was willing to take an affidavit conjointly with appellants' counsel, setting out that an order transferring this cause to New Orleans had been granted, the affidavit to be in place of the order said not to have been carried on the minutes, and that it was then agreed between the affiant and appellants' counsel to take up the case at once in New Orleans; that subsequently the affiant ascertained from the clerk of the lower court that the appellant had not taken out the transcript or paid for it; that the affiant then wrote two or more letters to appellants' counsel asking him to take up his transcript.

From an affidavit of the deputy clerk of the lower court and from correspondence filed, it would seem that there was some delay in paying for the cost of the transcript, which was not settled until April, 1893.

In his affidavit already mentioned, appellants' counsel avers that until the clerk of this court at Opelousas wrote him that there was no order for the transfer, he intended *bona fide* and was preparing to file the transcript in New Orleans at the term beginning in November, 1892, but that after receiving the clerk's letter he believed that the order of transfer had not been rendered and that he did not discover the truth until July 3, 1893. That in December, 1892, believing that the order had not been rendered, he so informed appellee's counsel, and that they agreed to dispense with the order and to take up the case in New Orleans, but that appellants' counsel required a certain sum of money for briefs, etc., which he requested by letter of his client, from whom he received no reply.

In point of fact, this court, as already stated, granted on July 8, 1892, the joint application of the parties for the transfer of the cause to New Orleans, and the order was then duly entered on the minutes. No one denies that the order was made. It is evident that the court must be guided by its minutes. However regrettable may be the

misunderstanding between appellants' counsel and the clerk, it is perfectly clear that it can not have the effect of annulling an order rendered in open court, at the request of counsel for both parties and in their presence. Besides, appellants' counsel being erroneously informed prior to the convening of this court in November, 1892, that the order had not been entered, made no attempt in this court to have the supposed omission supplied. Again, appellee's counsel having offered to waive the order supposed not to have been entered and to try the cause at the term beginning in November, 1892, and appellants' counsel having agreed thereto, the agreement was not carried out by appellants' counsel, presumably because of appellants' neglect to supply the means necessary for briefs and other incidentals of the hearing.

But even if any law had been cited to us, or if any had been discovered by us, which would authorize us to declare our order of July 8, 1892, null and of no effect, would appellants be benefited?

The claim of appellants' counsel is that having been misled into believing that the order had not been entered, he considered that the failure to enter the same revived the order previously rendered extending the time for the filing of the transcript to July, 1893, at Opelousas.

The authorities are numerous that when an extension of time has been granted, the appellant is not entitled to three days of grace to file his transcript. Cane vs. Caldwell & Kahn, 28 An. 790; Bienvenu vs. Insurance Co., 28 An. 901; Von Hoven vs. Von Hoven, 43 An. 1170; and other cases.

This court convened in Opelousas on July 3, 1893, and the transcript was filed on July 5, 1893.

It is therefore clear that whether the appeal be considered as returnable in New Orleans at the term beginning in November, 1892, or in Opelousas at the term beginning in July, 1893, the appeal must be dismissed.

It is therefore ordered that the appeal be dismissed at appellants' costs.

Breaux, J., recuses himself, having been of counsel.

No. 11,415.

46 145
48 1536

STATE EX REL. PAUL GELPI & BRO. VS. BOARD OF ASSESSORS ET ALS.

46 145
51 1067
51 1068

Imported goods in the importer's possession are not part of the property in the State subject to taxation.

While they remain in the original package the importer owes no tax upon them.

An article imported continues to be a part of the foreign commerce of the country while in the hands of the importer for sale in the original package.

The authority to import carries with it the right to sell the article in the original package.

When it has passed into the hands of a purchaser it is no longer an import and is subject to taxation like any other property.

The goods were sold by the importers in the original packages.

They can not be taxed.

APPEAL from the Civil District Court, Parish of Orleans. *King, J.*

Harry H. Hall for the Relator and Appellee:

Imported foreign goods in unbroken original packages in the hands of the importers, upon which import duties have been paid to the United States, are not liable to State taxation. 12 Wh. 419; 13 Wall 29; Saunders on Taxation, 35; Desty on Taxation, vol. 1, p. 232; 24 How. 169; 8 Wall. 123; 8 Wall. 148; 13 Wall. 84; 12 Wh. 447; 5 How 504; 13 Wall. 129; 15 Wall. 284; 96 U. S. 447; Desty, vol. 1, 238; 12 Wh. 419; 13 Wall. 29; 105 U. S. 460; 91 U. S. 275; 97 U. S. 466; 103 U. S. 344; Colley on Taxation, p. 95.

Geo. W. Flynn, Assistant City Attorney, and *E. A. O'Sullivan*, City Attorney, for Defendants and Appellants.

The opinion of the court was delivered by

BREAUX, J. The admitted facts are, that the relators conduct a commercial partnership as importers of foreign goods in New Orleans; that they (the goods) are foreign imports; that at the date of the assessment they had in stock $15,000 worth of imported goods, of which $1000 were in broken packages and $14,000 in original packages; that at no time during the year the quantity or value of imported goods in broken packages exceed $1000; that during the course of the year they sell the entire $14,000 in the original packages imported, and they are in their store subject to such sales as can be made during the year. It is also admitted that the import or impost taxes have been paid.

Application was made to the Board of Assessors for the cancella-

tion of the $14,000 assessed upon goods in original packages, also to the Committee on Revision for the taxes for the year 1893.

The relators claim that the assessment is illegal; that the duty on the goods imposed by the act of Congress had been paid to the United States; that the tax assessed was in effect an additional import duty which could not be constitutionally imposed by State law.

The respondent, the city of New Orleans, defends on the ground that the relators had, by their disposition of the property, incorporated it in the mass of the property of the State; that by their act the importers have mixed the property with the other values in the State subject to assessment.

That a State law including original packages as property to be taxed would be repugnant to the prohibition of the Constitution upon the States not to lay any imposts or duties on imports is conceded by respondent.

1. The respondent argues that it is not essential to break every package in the stock of merchandise in order to commingle them with the other property of the importer.

2. That by the admission that the goods are in relators' store, subject to sale, they have become taxable property.

Commencing with the case of Brown vs. Maryland, 12 Wheat. 447, the Supreme Court of the United States in a number of decisions has invariably held that imported goods from foreign countries are not subject to taxation under State laws until the packages are broken, or they have been sold by the importer.

Relative to broken packages: When the imported goods are broken up they become subject to taxation as part of the bulk of the property in the State. Desty, Vol. 1, p. 284.

Relative to sales: At all times between the arrival of the goods imported and the sale by the importer, if the packages are not broken from the original cases, they are not subject to State taxation. Low et al. vs. Austin, 13 Wall. 34.

With reference to imports the United States Supreme Court in another case holds: "We have held property in one stage of its ownership," prior to its sale, "not to be taxable," and in a succeeding stage "to be taxable" after the sale by the importer in original packages. Murray vs. Charleston, 96 U. S. 446.

Breaking packages as applied to imported goods has a defined meaning.

The package consists of a number of things bound together convenient for handling and conveyance.

A package means a bundle put up for transportation or commercial handling. It is a thing in form to become as such an article of merchandise, or transportation or delivery from hand to hand. United States vs. Goldback, Hughes Reports, Vol. 1, p. 528.

The breaking or destroying the entirety of the package is a clear definition which does not admit of comment.

Applying these principles to the case at bar it is obvious that the packages were not broken and that the importers had not sold the goods.

The evidence shows that at no time during the year the quantity or value of the imported goods in broken packages exceeded $1000, and that during the year the relators sell the entire $14000 remaining in the original packages in which they are imported, and that they are in their store subject to such sales as can be made during the year.

Any argument that there was a breaking of the packages or a mixing of part of the goods claimed as exempt from taxation is not sustained by the evidence. The sale during the year of the goods valued at $14,000 is made in the original.

The fact that these goods are for sale in the store does not change their ownership nor necessarily have the effect of mingling them with other goods that are not in packages.

The immunity from payment of the taxes follows the goods without reference to the place in which they are stored.

That they are offered for sale in unbroken packages in the importers' store is not in effect the breaking of the packages, or such a disposition of the goods as causes the immunity from the tax to end.

The writs were made peremptory by the judgment of the District Court.

We affirm the judgment.

Mr. Justice Parlange takes no part.

46 147
114 525

46 147
e117 570

No. 11,316.

STATE OF LOUISIANA VS. JOHN STONE.

The defendant was found guilty of selling adulterated milk.

The defendant having handed two samples of milk, less than a pint in each, without the least objection, is not in a position before the court to question the validity of that part of an ordinance which provides that dairymen shall fur-

nish, under the penalty of fine and imprisonment, gratuitously, samples of milk whenever required so to do by the health officer, to be subjected to analysis.

There should be some objection made in order that the vendor of milk may not appear to give unqualified assent to furnishing the milk asked.

While defendant's waiver precludes him from defending on the ground that the milk for analysis was unlawfully obtained, the fine imposed enables him to question the validity of the remainder of the ordinance.

Under the police power and the statutes delegating authority to the municipality, the City Council may protect health by prohibiting the adulteration of milk, and may adopt ordinances to that end.

Such ordinances are not open to the objection that they transcend the limits of municipal authority; the purpose being the protection of public health.

To secure such a purpose persons and property are subjected to many restraints and burdens.

Those who directly feel the restraints and burdens are presumed to be rewarded by the common benefit secured.

The ordinances were designed to insure the purity of an article of food upon which many families are dependent. It is of universal consumption.

The police regulations upon the subject are designed to prevent fraud and protect health.

Under the police power and the delegated authority the ordinance of the Council relating to the necessity of selling pure milk, is legal and the fine was legally imposed.

These ordinances, without proof to the contrary, are not unreasonable. The standard adopted to test the purity of the milk can not operate to the exclusion of all other evidence upon the subject.

Upon proof of the unreasonableness of the standard, that part of the ordinance relating to standard of purity of milk would be illegal and amenable to the charge of unreasonableness.

There is no such proof of record.

APPEAL from the First Recorder's Court, City of New Orleans. *Whitaker, J.*

Frank McGloin Attorney of Board of Health, for Plaintiff and Appellee.

Jas. C. Walker for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. The defendant appeals from a sentence of the First Recorder's Court condemning him to pay a fine of $25, and in default of payment to suffer imprisonment for thirty days on the charge of selling adulterated milk in violation of an ordinance of the city.

His ground of appeal is that the ordinance provides for the con-

viction of dairymen by means of evidence forbidden by the Constitutions of the State and the United States by ordaining that they shall furnish, under the penalty of fine and imprisonment, gratuitously, samples of milk whenever required so to do by the health officers, to be subjected to analysis.

The defendant on the trial objected to the introduction of proof as to the quality of the samples of milk.

The defendant delivered to the inspector two samples, one from each can of the milk he had for sale. Each sample consisted of a mall quantity, less than a pint, which the inspector handed to the chemist of the Board of Health.

After the analysis the inspector made an affidavit against the defendant, charging him with having violated city ordinance 6596, relating to adulterated milk.

As a witness on the trial the chemist testified that the milk was below the standard. With reference to the analysis he testified that it was accurate, and explained the method followed in testing the milk; that he had examined a large number of samples of natural milk, and that in no instance had he found them less than the standard adopted, except where the cows were diseased, or just before or after parturition.

The constitutionality of the ordinance is questioned.

The facts, as disclosed by the record, do not prove that the defendant was compelled to be a witness against himself and furnish samples of milk.

While in order to retain a right in opposition to any demand in execution of a law, on the ground of its illegality, there is no necessity to resort to downright resistance or to a display of combativeness; there should be sufficient objection manifested to render it certain that assent was not intended.

The facts upon this point are in evidence and have been considered.

They prove compliance and in consequence exclude certain constitutional objections that would necessitate a decision if the defendant had been forced to give up the samples.

Moreover: "Where power is expressly given to municipal authorities to license and regulate trades and callings generally, or certain specified trades and callings, or where power to exact licenses is implied, it will be found that such authorities have very commonly pro-

hibited certain employments which affect closely the public health or safety, except the persons engaged therein take out licenses to prosecute such employments. This restriction is usually applied to the business or employment of architects, bakers, dealers in old rags or in meats and provisions, or in milk, or in spirituous liquors, or in dangerous articles," and other trades and occupations. Parker and Worthington, p. 298.

License itself is one of the means of regulation.

It has the effect of lessening the number that would, without it, engage in the trade or occupation licensed and thereby to a corresponding extent decreases competition.

By the license the trade or occupation is brought more directly within the scope of the police power.

This being a fact of which it must be presumed the defendant was aware when called upon for samples, instead of objecting he delivered them to the inspector and continued selling the milk he had for sale.

He can not be heard to question the regularity or legality of the execution of the ordinance, to the execution of which he consented.

The acquiescence in the execution of the ordinance does not have the effect of defeating the plea of the illegality of the ordinance itself as violative of the Constitution and *ultra vires*.

The consent to a test does not make legal that which may be illegal in the ordinance under which the proceedings were instituted and the fine imposed.

The waiver of a citation and of other informalities under which a defendant may be brought in court and proof offered against him is not a waiver of illegalities of the law under which he is prosecuted and condemned. A similar rule applies to the case at bar.

The authority *vel non* of the municipality to pass the ordinance in question under the City Charter, and the implied power of the municipality under the charter are remaining issues for our determination.

Under the charter the council has the power, and it is made their duty, to pass such ordinances and to see to their faithful execution as may be proper and necessary to prevent the sale of adulterated food and to punish those guilty of adulterating food and drinks.

The authority to punish the violators of ordinances drawn under

Secs. 7 and 8 of the Charter is delegated by Act 41 of 1890. State *ex rel.* Joseph vs. Bringier, Recorder, 42 An. 1095; State vs. Boneil, 42 An. 1110.

The ordinance under this authority adopts a standard by which the adulteration of milk shall be determined, and ordains that any person found guilty of selling milk below the standard shall be subject to a fine of not more than $25 for each offence, and in default of payment to imprisonment for a period not exceeding thirty days, thus conforming with the requirement of the statute delegating authority to the municipality.

The statute and the ordinance were properly directed to fixing a legal standard to which all milk is subjected; to fixing penalties for violation of the ordinance and establishes the duties of the chemists by whom the analysis is made. These details are appropriately within legislative control; they do not transcend the limits of legislative authority. They belong to the class of police regulations designed to protect health and prolong life.

The intention throughout was to prevent the sale of adulterated milk.

The provisions fixing a standard are valid, as they merely control and regulate the method of ascertaining the quality

The design being to prevent the sale of adulterated milk and to regulate an employment that must be regulated, it was not *ultra vires* on the part of the council to fix a standard of quality of the milk.

The exercise of trades and occupations are subject to reasonable conditions essential to health; if the power be not express, under the implied power the council would have the authority to adopt measures to maintain a standard of purity of that article of food to the extent of preventing the evil and injurious consequences to the public or to individuals.

The question was decided in State vs. Fourcade, 45 An. 717.

Judgment affirmed at appellant's cost.

No. 11,258.

SOLOMON REINACH VS. MISS ARMANTINE ALLARD DUPLANTIER.

46 151
52 1506

The property claimed was forfeited to the State in 1877 in compliance with Statute 96 enacted that year.

In 1885 it was adjudicated to the State under the provisions of Act 96 of 1882, for the State taxes of 1882 and 1883. It was also adjudicated to the State of Louisiana for the State taxes of 1880 and 1881.

The plaintiff sued to be placed in possession as owner.

The defendant filed no appearance in the suit prior to the confirmation of the default.

Before the judgment was signed she moved for a new trial on the ground that the property could not be conveyed by the State under Act 80 of 1888.

Although the property was forfeited to the State in 1877, taxes were assessed upon it for 1880, inclusive, to 1884, for which it was sold.

To obtain payment of taxes for these years the property could be sold under the law of 1888.

Moreover, the defendant invokes the forfeiture to the State of a date preceding 1880, and the fact that the State became the owner; under that forfeiture.

The owner prior to the forfeiture is without interest to have annulled a conveyance made by the State after she was no longer the owner; the State had become the owner by the forfeiture.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

Benjamin Ory for Plaintiff and Appellee.

Lazarus, Moore & Lemle and *I. N. Luce* for Defendant and Appellant.

The opinion of the court was delivered by

BREAUX, J. The action is petitory.

In his petition the plaintiff alleges that the State of Louisiana had acquired the property by forfeiture under Act 96 of 1877 for State taxes of 1877 and 1878.

Moreover, that the State had acquired the same property by adjudications for State taxes for the years 1880, 1881, 1882 and 1883, made in the years 1884 and 1885; that for the years 1880 and 1881 the property was assessed in the name of Joseph A. Peniston, and for the years 1882 and 1883 in the name of the defendant; that the latter inherited from the former, and was placed in possession of the property on December 31, 1881.

The service of the citation and petition was personal.

In due time a default was entered against the defendant.

About six months elapsed between the default and the date of the confirmation of the default.

After judgment had been rendered on the confirmation of plaintiff's default, before the judgment had been signed, the defendant moved the court for a new trial, on the ground that the judgment was contrary to law and evidence, and that it was not competent for

the State to make a sale of the property described in plaintiff's petition, consisting of town lots, under the act of 1888.

The defendant argues that the land having been forfeited to the State, as alleged in plaintiff's petition, it should have been sold under Act 187 of 1880 or Act 82 of 1884, and that the Auditor was without authority to convey title under Act 80 of 1888; that that act provides for the sale of lands that had been sold to the State for the taxes of 1880 and subsequent years; that the property having been forfeited to the State for the taxes of 1877 and 1878 was improperly assessed in the name of the defendant for the years 1880 to 1884, inclusive, and that a sale based upon that assessment is illegal; that lands belonging to the State are exempt from taxation; that the land, by the forfeiture for the taxes of 1877 and 1878, as alleged in plaintiff's petition, became the property of the State and was not subject to taxation.

The defendant cites the case of Bradford vs. Lafargue, 30 An. 432, in support of the proposition that by the transfer to the State a taxes existing on the property at the time were extinguished by confusion, and that, subsequent to the transfer, the property is exempt from taxation.

Applying that decision to her case, she urges that after the forfeiture of the property to the State for the taxes of 1877 and 1878 the State became the owner and all taxes subsequent were extinguished by confusion, and that it was improperly assessed while it remained the property of the State.

In the last deed, dated in 1892, that under which the plaintiff owns as vendor, the Auditor of the State declares that in pursuance of Section 3 of an act approved July 12, 1888, No. 80 of 1888, he conveys the property described to plaintiff.

That it is the property which was adjudicated to the State for the unpaid taxes of the years 1880 and 1881 in the name of J. A. Peniston, and in 1882 and 1883 in the name of A. A. Duplantier (the defendant), on the 20th December, 1884, by James D. Houston, tax collector, for unpaid taxes due the State of Louisiana, and that it had been duly advertised and offered for sale by I. W. Patton, tax collector, in accordance with the provisions of Act 80 of 1888; that the sale was made for the price of $102 cash.

Copies of the deeds referred to in this last act were admitted in evidence.

The forfeiture to the State under Act 96 of 1877 vested full title in the State of all the right and interest of the party assessed in the property, subject only to a right of redemption.

There being no informality in the forfeiture, it being alleged that the property was forfeited, and the defendant having conceded *ex necessitate rei* for the purpose of her defence on the rule for a new trial that the property was forfeited as alleged, it absolutely and unqualifiedly became the property of the State from the day the time to redeem had elapsed.

The State acquired the immediate dominion.

Property is the absolute right of the owner to enjoy and dispose of a thing. The defendant is without interest to question the legality of the title conveyed under Act 80 of 1888.

A similar question was considered in Morrison vs. Tax Collector, 26 An. 699. This court held that the former owner (who contended that the tax collector could not sell his land, it having been forfeited to the State) could not assume that position without putting himself out of court, because if his lands were forfeited to the State, the only remaining right was the right of redemption.

The same may be said as applying to the case at bar; the former owner invokes the fact that the property involved was forfeited to the State.

In Breaux vs. Negrotto, 43 An. 432, the court is as emphatic:

"The divestiture of title was complete, and it is immaterial to the owner prior to the divestiture in what manner the State disposes of her property."

In Martinez vs. Tax Collector, 42 An. 677, we said: "No reasons are urged and can be urged why the State, being the owner of the property, could not sell the same and fix the price, and impose such conditions in the sale as she deemed fit and proper."

The case of Morrison vs. Tax Collector, 30 An. 432, was decided under revenue statutes since repealed. At the time sales could be made upon payment to the collector of the amount of the State and parish taxes due on the property, and no provision was made to collect taxes upon property accruing after it has been adjudicated to the State.

In State *ex rel.* Dowers vs. Recorder, 45 An. 566, it is stated: "It likewise appears to be clear that it was the definite purpose of the Legislature to make the property purchased by the State liable to

subsequent taxation, State, parish and municipal, as will appear from the following, viz., 'the price bid and paid for said property shall be in full and final payment and satisfaction of all State taxes, together with all costs—and the purchaser shall take said property subject to all subsequent taxes.'"

The sale was made to the plaintiff for a price, including the taxes assessed on the property after it had been adjudicated to the State.

In two cases of recent date it was decided that in order to become the owner, the purchaser must pay all the taxes, including those assessed after the property had been adjudicated to the State. Breaux vs. Negrotto, 43 An. 432; Martinez vs. Tax Collector, 42 An. 677; Morrison vs. Tax Collector, 80 An. 432.

They are taxes due on the property which must be paid in order that the purchaser may have a complete title.

The law relating to a confusion of right extinguishing obligations, when the qualities of debtor and creditor are united in the same person, does not apply.

It was competent for the Legislature to enact a statute excluding the State from the operation of the law regarding confusion and authorizing the collection of a tax upon her own property.

The statute, 80 of 1888, provides for the sale of property bid in and adjudicated to the State for taxes for the year 1880, and subsequent years.

The taxes for which the property was sold were assessed within the years provided by that act.

The forfeiture to the State in 1877 does not affect the right to taxes for years subsequent to 1880 on property adjudicated to the State.

The defendant has no interest enabling her to have a nullity of a title pronounced.

The judgment appealed from is affirmed at appellant's costs.

No. 11,295.

46 155
48 616

NEW ORLEANS, FORT JACKSON & GRAND ISLE RAILROAD COMPANY VS. HORACE B. TURCAN.

1. In cases of flood, as in those of conflagration, services rendered voluntarily to preserve another man's property from destruction are presumed to be gratuitous and give no cause of action.

2. Under the present levee system of the State the riparian proprietor upon whose property a crevasse has occurred is not legally bound to close the same or to rebuild the broken levee. When a third person voluntarily furnishes materials and pays for labor in aid of closing the break, he can not call upon the owner of the land to reimburse to him his expenditures. To recognize such a right would be to practically return to the old system.

APPEAL from the Twenty-second District Court, Parish of Plaquemines. *Livaudais, J.*

James Wilkinson for Plaintiff and Appellant:

In May, 1892, it was the legal duty of the defendant to keep the levee fronting his Happy Point plantation in proper order, preservation and repair. Ordinances Police Jury Parish of Plaquemines; Act 84 of 1884; Barrow vs. Hepler, 34 An. 362; Bass vs. State, 34 An., p. 503; Act 88 of 1880; Act 104 of 1882; Slidell vs. Grandjean, 111 U. S. 321; 8th Howard, 66; Rev. C. C., Articles 665, 646.

Where the defendant has established a dangerous agency in a levee, such as a rice flume, he is held in seasons of very high water to greater care in seeing that all necessary precautions are taken to avoid a crevasse. Act 143, Sec. 11, of 1890.

Where a crevasse has occurred through the gross fault and neglect of the most ordinary care, by defendant, and plaintiff has closed the same, thereby saving the property of defendant, and relieving him from liability for the immense damage his fault would have caused, he must reimburse plaintiff his reasonable outlay as *negotiorum gestor* in closing said crevasse, and that irrespective of whether plaintiff was saved from great loss or not by said closure, since the crevasse occurred through the gross negligence of defendant. Police Jury vs. Hampton, 5 N. S. 391; 2d Robinson, 139; 4 An. 22; 2 An. 146; 8 An. 68; 10 An. 395; 16 An. 433; 26 An. 4; 36 An. 451; 41 An. 993.

Plaintiff is further entitled to a lien and privilege on the plantation whereon the levee is situated. Rev. C. C. 3249, p. 4.

E. Howard McCaleb for Defendant and Appellee:

1. Where plaintiff claims from the defendant damages for his negligence in failing to keep his levee in good order and condition, a duty alleged to be imposed upon him by the law of the State and ordinances of the police jury then existing, and the law creating such supposed duty has been repealed before the institution of the suit, plaintiff's action must fail. The repealing law deprives him of all remedy. Act No. 84 of 1884; Act No. 13 of 1892; 109 U. S. 285; 32 An. 709. No law of the State or ordinance of the police jury of Plaquemines parish requires the front proprietor to fascine his levee, and he is not liable for damages for failing so to do, especially where it is shown to be usual and customary.

3. A rice flume in the levee on the right bank of the Mississippi river, below the lower line of "Live Oak Grove Plantation," in Plaquemines parish, is not considered a dangerous agency, being specially exempt from the operation of the law prohibiting rice flumes. Section 11, Act No. 144 of 1890.
Especially where, as in this case, it is shown that the rice flume remained in position during the crevasse, and where two other crevasses occurred in the same vicinity about the same time during the high flood of the Mississippi river.

Crawfish and muskrats are more dangerous agencies in the levees of Plaquemines parish than rice flumes.

4. The plaintiff, claiming damages in this case, owns and operates a railroad having its track four arpents from the Mississippi river; it was as much its duty as defendant's, the riparian proprietor, to keep the levee in repair. In closing a crevasse in the levee near its track it was protecting its own property, and can not visit the loss it has thus sustained upon the unfortunate defendant. The crevasse is not shown to have been occasioned by fault or neglect of defendant, and without fault there can be no liability. Nitro-glycerine Case, 15 Wall, 524.
5. The defendant must be presumed to have been diligent in protecting his property. "Parcequo chacun est présumé diligent à conserver son bien, ses effets, et d'ailleurs nec afflicto danda est afflictio." Duranton, Tome 17, No. 105.
6. The crevasse was the result of *force majeure* exclusively and the services rendered by plaintiff in closing it are presumed to be gratuitous and give no cause of action, especially where, in doing so, it was protecting its own property. Section 25, Act of 1829, imposing upon front proprietors liability for damages for neglecting to care for and protect their levees was long since repealed. Leblanc vs. Pitman & Barrow, 16 An. 436.
7. The war changed the legislation and jurisprudence which imposed on the front proprietors the duty of constructing and repairing their levees. Police Jury of Jefferson vs. Tardos, 22 An. 61.
8. Upon the question of a negligence *vel non*, the verdict of the jury, approved by the judge *a quo*, is entitled to great weight and will not be set aside unless manifestly erroneous.

The Supreme Court always attaches great weight to the verdict of a jury on questions of fact, the credibility of witnesses, etc. H. D., Vol. 1, p. 92, No. 1.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiffs allege that the defendant is the owner of the Happy Point plantation, in the parish of Plaquemines, on the right descending bank of the Mississippi river. That said land was protected on the river front by a magnificent levee built by the State of Louisiana, through the defendant as contractor, who was paid by the State for the building of the same. That under the laws of the State and under the ordinances of the police jury of the parish, authorized by said laws, the legal duty of maintaining and keeping said levee in good order and repair was imposed on the defendant, the owner of said property. That though said levee was built of fresh earth and exposed somewhat to the river, the defendant negligently and imprudently failed to fascine the same or even put stakes or trash or any protection to said levee from the erosive action of the swells of the rising river, and although a storekeeper, conducting and carrying on a storekeeping business within fifty feet of said levee, he remained quiescent while during the months of April and

May the river washed the outside of this levee down until it became a mere shell. That with a nominal expenditure the levee, which was 2½ feet above the highest flood level of 1892, could have been protected, but through a reckless indifference and disregard of his duties toward himself and the public, the defendant grossly, carelessly, negligently and imprudently failed to protect said levee with either sacks of earth, planks, willow brush or rice straw, and as a result of his negligence aforesaid, a hole appeared in said levee just below his rice flume, on or about the evening of the 17th of May, 1892, when the river was very high. That before then, and then, the neighbors and laborers besought the defendant to repair and protect his levee and to stop at least said hole, which was then spouting water at a distance of about seventy-five feet from his store, filling the road with water, and being alongside of a rice flume was known to him to be doubly dangerous, as in case of a crevasse and the washing out of said flume the depth of in-rushing water would be very great. That said appeals to defendant were disregarded by him and wilfully, negligently, carelessly and wrongfully the defendant utterly failed, omitted and refused to either protect said levee or stop said hole or employ the necessary force or material to accomplish anything toward said end, and then on or about the 18th May, 1892, said levee, abandoned to its fate by its owner as aforesaid, gave way on the lower side of said rice flume, and the water rushed through with great force, flooding the plantation of the defendant and the surrounding country.

That the plaintiff corporation own and operate a railroad through the west bank of Orleans, Jefferson and Plaquemines parishes, which passes about four acres back of the crevasse on the Happy Point plantation.

That as soon as they became aware of said crevasse plaintiffs collected large quantities of materials, lumber and sacks and a large number of laborers and rushed them down to said crevasse on special trains.

That when plaintiffs took charge of said crevasse it was increasing rapidly and was of great depth, said rice flume washing out while the work was going on, and, if unchecked, it would have certainly washed down a large and valuable store and dwelling house and stables of defendant, and swept a deep hole through the front portion of his property.

That moreover, if allowed to increase, the said crevasse would have become a very large one, and have destroyed not only his own crops, but would have done over $100,000 damages to other crops, for which defendant would have been liable, as said crevasse occurred through his inexcusable and criminal negligence and want of care of his legal duty in the premises.

That only by the utmost diligence and strenuous efforts of plaintiffs was said crevasse closed, which, but for it, would be still running, inflicting untold disaster to the whole community.

That the closing of said crevasse cost the plaintiff corporation the sum of $5000, including the use of trains, for which they made no charge.

That plaintiffs annexed to their petition a statement of the amount of expenditures incurred by them in the closing of the said crevasse, and they averred that the amounts paid and charged therein were just and reasonable.

That defendant is liable to the plaintiffs for said amounts, first, because they had performed a work that it was the legal duty of the defendant to do, and had saved defendant's property and relieved him from heavy liability for heavy damages, and they are therefore entitled to reimbursement for said amount expended, from the defendant, with a lien and privilege on the said property.

That defendant is moreover liable to plaintiffs by reason of the fact that said crevasse occurred through the negligence and imprudence of defendant, and that if said crevasse would have been allowed to run plaintiffs' trains would have been stopped and plaintiffs greatly damaged by the aforesaid acts of omission of the defendant, and that the legal and honest expenses to prevent said damages were really damages sustained by them through the fault and neglect of the defendant as aforesaid, and for which he is liable to them. In view of the premises, they prayed that the defendant be condemned to pay them the sum of four thousand four hundred and seventy-three dollars (that being the amount shown on the exhibit or account annexed to the petition), with legal interest from judicial demand, with first lien and privilege on the property known as the Happy Point plantation.

The charges made in the account were for sacks, lumber, nails, straw, drayage, labor and board.

The defendant pleaded the general issue and prayed for trial by jury.

The case was tried by a jury, which, by a vote of 9 to 3, returned a verdict in favor of the defendant.

Plaintiffs moved for a new trial.

In passing upon the motion for a new trial the district judge said that the jury had been instructed as to the law applicable to the case, as shown by the written charge of the court on file, and instructed that they were the judges of the law as well as of the evidence and of the sufficiency of that evidence and the credibility of the witnesses. That the application was made upon the evidence alone, and particularly upon the question of negligence *vel non* on the part of the defendant, of which evidence submitted to them the jury are the best judges. For these reasons he refused the application and rendered judgment in favor of the defendant, rejecting plaintiffs' demand in conformity to the verdict.

The plaintiffs have appealed.

On or about the 18th May, 1892, a crevasse occurred on the Happy Point plantation, in the parish of Plaquemines, belonging to the defendant.

As soon as the plaintiffs ascertained that fact they dispatched a train with materials to the place in order to assist in closing the break. There is no doubt but that they contributed large amounts of materials and furnished a great deal of labor, which they paid for in aid of this result.

We are called on to say whether plaintiffs are entitled to recover this amount from the defendant.

The question before us is not whether the defendant was legally bound to have taken all proper steps for the repair and protection of the levee on his property—whether he performed this duty or not—whether if he did not do so the parochial authorities would have had the legal right to have had it repaired or protected either directly or through the instrumentality of third parties or third parties could of their own motion have done so with a legal right to reimbursement, for no claim is asserted for expenditures made in the repairing or protection of defendant's levee prior to its breaking. What is contended for is that expenditures made by the plaintiffs for the closing of the crevasse after it had taken place are recoverable from the owner of the property on which it occurred in an action as for moneys expended for his use and benefit.

We say in an action for moneys expended for his use and benefit, for that is the character of the one at bar.

No conventional contractual relations are advanced as having existed between the parties, and although averments are scattered through the petition to the effect that defendant was legally bound to have kept his levee in proper repair and properly protected—that he had violated that duty and that he was guilty of negligence, which led up to the crevasse as the cause thereof; and although the plaintiffs in one allegation declared that the amount of their expenditures were in reality damages sustained by them, we are of the opinion that plaintiffs' demand is not one *ex delicto* for damages.

The plaintiffs do not ground their cause of action upon the allegations we have referred to—they were inserted in the petition in support of the theory on which this case is based, which, as we have said, is that the moneys expended enured to the benefit of defendant and were therefore to be repaid. They were doubtless suggested as useful for that purpose by the line of thought followed in Police Jury vs. Hampton, 5 N. S. 393. The fact that plaintiffs in one of their allegations declare that the moneys expended by them were in reality damages to them can not change the character of the action as shown by the prayer and the pleadings as a whole, and where on the face of the papers the allegation to that effect is legally incorrect.

If the plaintiffs could recover from the defendant the amount demanded, they certainly could not do so under their pleadings, by way of damages. Admitting as true the fact alleged that they did expend the amount claimed in closing the crevasse on defendant's land, that fact would not furnish legal evidence of damage *per se* to them to the same amount as resulting from the break—the outlays made would have no necessary legal connection with damages suffered—it would be no test of or measure of damages.

A third person may spend large amounts in closing a break in the levee on another's property perfectly consistently with the fact that neither the crevasse nor its long continuance would affect his interest to the amount of a single dollar. Plaintiffs allege no damages outside of their expenditures.

Under the views we entertain of the action we confine our inquiry to the question whether plaintiffs can recover the amount sued for as for moneys expended for the use and benefit of the defendant.

At the very threshold we meet the rule announced in Watson vs. Ledoux, 8 An. 68, that "in cases of flood, as in those of conflagration, services rendered voluntarily to preserve another man's property

from destruction are presumed to be gratuitous and give no cause of action."

Did the plaintiffs adduce any fact on the trial of this case to take it out of the rule so proclaimed? We think not.

Formerly the front proprietors on the Mississippi river were required to construct the necessary levees and embankments along their front lines on the margin of the river at their own cost, and in default thereof the required work might be done at their expense by the parochial authorities, but this court in Police Jury of Jefferson vs. Tardos, 22 An. 58, held that the act of the Legislature, approved February 17, 1866, repealed all former laws authorizing the parochial authorities to construct levees at the cost and expense of the front riparian proprietors of the lands leveed, and since its date the parish could not force them to pay the cost of a levee which she has ordered to be constructed along the front line and that no re-enactment of former laws had been made at the time of its decision. It further said: "The legislation on the subject of levees since the late war has manifestly been framed with reference to the great changes which have been wrought in the condition of the country by the late war. The vast expense formerly imposed upon the riparian proprietors of building the heavy embankments necessary on the Mississippi, and to make continuous repairs upon them, would now, under the altered state of affairs in regard to capital and labor, be utterly ruinous. Hence the policy was a wise one to relieve that class of our people by a change of the laws and regulations in respect to the levee system."

We have been referred to no law, and we know of none, altering the situation as stated in the case of Tardos, making it the duty of front riparian proprietors to build the levees on their front either when new levees become necessary by gradual changes and encroachments of the river or from the sudden sweeping away of the old levees by crevasses. That work has now to be done by the public authorities. If the defendant in this case could not have been legally called upon to close the break which had occurred on his plantation either by the public authorities or by his neighbors, the plaintiffs could not by going forward of their own accord and closing the work primarily at their own expense force the defendant to subsequently defray that expense—to recognize such a right on their part would be practically to return to the old system. If the plaintiffs have any

claim, legal or equitable as arising from the outlay made by them, it would be against parties other than the defendant.

The contention that the plaintiffs have through their action saved the defendant from damages for which he otherwise might be liable is predicated upon considerations remote and purely conjectural and speculative. They might under the former system have been adduced as an argument supporting and fortifying such a demand as was advanced by the Police Jury against Hampton (5 N. S. 393) under the then existing laws, but standing alone under the present condition of affairs they do not form the basis of a claim for reimbursement in this suit.

The conclusions we have reached and just announced do away with the necessity of our expressing any opinion upon the positions taken by the defendant that plaintiffs as operating a railroad running along the river and owning the lands upon which the tracks are laid on portions of the properties having fronts upon the Mississippi river would be as much bound for the repair and protection of the levees as the parties owning those properties directly upon the river, and that in making these expenditures plaintiffs were acting in their own name and for their own benefit and not for defendant.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

Rehearing refused.

No. 11,422.

STATE EX REL. A. LEHMAN & CO. VS. HON. FRED. D. KING, JUDGE OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, ET AL.

1. The contention is not well founded that a judge of the Civil District Court who grants prior to allotment an order of injunction, in so doing, exhausts his power over the order and is without authority, subsequently and prior to allotment, to modify or rescind the same. Until allotment he, for legal purposes retains control of his own order.
2. Where such a second order has been granted and it is sought to have the same reviewed under writ of *certiorari*, the judge of the particular division of the court who has at the time of the application for the writ, control of the case by allotment is the proper judge with whom to test contradictorily the order complained of.
3. It is a general but not an inflexible rule that prior to the modification or rescission of an order of injunction, notice should be given to the party who obtained the writ. Where the rule is departed from, it is propert hat such notice should be subsequently given, to the end that parties may guard their interests and rights.

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4. The powers of the Supreme Court, under Art. 90 of the Constitution, are not confined to writs of *certiorari*, prohibition, *mandamus* and *quo warranto*, but extend to other remedial writs.
5. Parties complaining of an order "suspending until after hearing" a prior order of injunction must, before invoking the supervisory powers of the Supreme Court, have unsuccessfully sought to have the "suspending" order rescinded. Where a restraining order is sought pending an examination of issues submitted for examination, the whole case should as far as practicable be placed before the court.
6. Where the United States Marshal (under writs of *fi fa* from the Circuit Court of the United States, directed against a lessee), having seized the "right of occupancy" of certain premises, has (with the consent of the lessor and the receiver of the lessee appointed by the Civil District Court) granted to a third person the right of occupying the premises on paying rent, until a sale under the writs, a creditor of the lessee subsequently attaching the "right of occupancy" of the same premises, in the Civil District Court, can not oust such person from his occupancy by *ex parte* injunction proceedings directed against him alone, nor is he entitled to a suspensive appeal from an order suspending until hearing, an *ex parte* prior order of injunction which would have accomplished that result

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APPLICATION for *Certiorari*, *Mandamus* and Prohibition.

Dinkenspiel & Hart for the Relator.

Lazarus, Moore & Luce for the Respondent.

The opinion of the court was delivered by

NICHOLLS, C. J. Relators represent that on January 1, 1894, they applied to the Hon. N. H. Rightor, one of the judges of the Civil District Court for the parish of Orleans, in the case entitled A. Lehman & Co. *et als.* vs. Walter P. Walsh, for an injunction against said Walter P. Walsh, their petition being verified by proper affidavits.

That the said judge granted the injunction as prayed for conditioned upon relators furnishing bond in the sum of $1000, which they did furnish with good and solvent security, and the injunction was thereupon issued by the clerk of the court, enjoining and restraining the said Walsh from carrying on business in the stores Nos. 145 Canal street and 7 and 9 Bourbon street in New Orleans, and from making any use of said premises except for the purpose of preparing for the removal of the goods therein belonging to said Walsh.

That on the same day a duly certified copy of said injunction under the seal of the court was served upon the said Walsh in person.

That the said petition and application for injunction was presented to the said judge prior to the allotment of said cause as authorized by the Constitution of the State and the rules of said court; that said cause was not allotted according to the rules of said court until the following day, Tuesday, January 2, 1894, when same was allotted to Division "B" of said court, presided over by Hon. Fred. D. King.

That at about the hour of 11 o'clock A. M. on said Tuesday, January 2, 1894, and before the allotment of said cause, the following order was endorsed on said injunction served upon the said Walsh, to-wit:

"Upon representations of H. L. Lazarus and a full statement of the facts, the writ issued herein is suspended until the further order of the court and after hearing. New Orleans, January 2, 1894.

(Signed) "N. H. RIGHTOR, *Judge.*"

That said copy of injunction with the said order endorsed thereon was thereupon filed in the clerk's office of said Civil District Court. That said order of January 2, 1894, was rendered without notice to relators, without any hearing of any kind, and they did not know of same until after it had been filed in the clerk's office as aforesaid.

That as soon after the allotment of said cause as possible relators appeared before the said Hon. Fred. D. King and asked for a suspensive appeal from said order, tendering a bond with good and solvent security in any amount to be fixed by the court, but on January 3, 1894, the said Hon. Fred. D. King refused said appeal as prayed for. That said order of January 2, 1894, is absolutely null and void and without effect, for the following reasons:

1. That in advance of the allotment of said cause the said Hon. N. H. Rightor had no right or authority to act in said cause—the granting of the preliminary writ of injunction having exhausted his authority in the premises.

2. That said order was rendered without notice and without hearing of any kind.

3. That said order purported to be rendered because of the presentation to the court of certain facts—and an order regularly granted can not be set aside by the court upon matters of fact until final hearing of the cause.

That under the Constitution of the State and the rules of said Civil District Court the granting of a preliminary writ by any judge of said court prior to an allotment does not in anywise affect the control of the cause by the judge to whom same may be allotted after the allotment, and therefore the said Hon. Fred. D. King, presiding judge of Division "B" of the Civil District Court, is alone competent to deal with said cause and is the only one of said judges against whom the process of this court may be directed as to said cause.

That relators are entitled to writs of *certiorari*, prohibition and *mandamus* to the end that said proceedings be enquired into, the execution of said order of January 2, 1894, restrained, and an appeal given the relator therefrom; the said writs to be operative in their order, so that if the writ of *certiorari* be granted and made peremptory the other writs will be unnecessary; or if the writ of *certiorari* be finally refused and a writ of prohibition granted the writ of *mandamus* will be unnecessary, and if both the writs of *certiorari* and prohibition be refused or set aside after final hearing that then the writ of *mandamus* be made peremptory.

In view of the premises, relators' prayer was that a writ of *certiorari* issue directed to the Hon. Fred. D. King, judge, commanding him to transmit the original record in the suit of A. Lehman & Co. vs. No. 41,200, Walter P. Walsh; that the validity of said order of January 2, 1894, may be enquired into and that said writ also be directed to the said Walsh, prohibiting him from acting under said order of January 2, 1894, and that in due course of law the said writ be made perpetual and said order annulled and set aside. Under the restriction before stated they prayed for a writ of prohibition directed to the said judge, enjoining him from enforcing or acting under said order of January 2, 1894, and that in due course said prohibition be made perpetual.

Under the restriction before stated they prayed for the issuance of a writ of *mandamus* commanding the said judge to grant a suspensive appeal from said order of January 2, 1894.

They prayed that Walsh be served with a copy of the proceedings.

This court ordered that a writ of *certiorari* issue and that the respondents show cause why the writs of *mandamus* and prohibition should not be granted as prayed for, but refrained from issuing any restraining order in the premises, for the reason that the petition

utterly failed to disclose, as it should have done, the character of the proceedings in the court below or the facts and circumstances of the case in which an intervention was asked. We were inclined, for this reason, to refuse relators' application in its entirety.

In the answer filed by the judge of Division "B," he states that he transmits not only the record in the case of A. Lehman & Co. vs. Walter P. Walsh, but other original records and copies incident to and connected with the litigation growing out of the seizures and attachments against the Runkel-Hoerner Company, Limited, in suits pending in the various divisions of the District Court for the parish of Orleans, and liquidation proceedings in which liquidators and receivers have been appointed and various orders granted therein; that he transmits and makes part of his answer the said records for the reason that they are part of and concern the same litigation of which the injunction sued out by A. Lehman & Co. *et al.* is but a part, and that said records show that all the attachment proceedings and cases, including those by relators, were transferred to and cumulated with the liquidation proceedings.

He avers that all the orders granted by him and the Hon. N. H. Rightor in the case aforesaid are legal and valid, and that relators are not entitled to a writ of *certiorari*.

That his own refusal to grant a suspensive appeal from the order suspending the injunction in the case of A. Lehman & Co. *et al.* vs. Walsh does not entitle relators to writs of *mandamus* and prohibition.

That the records transmitted show that an order of injunctiont was granted in the said case of Lehman & Co. *et al.* vs. Walsh by the Hon. N. H. Rightor, judge of Division "D," and that subsequently the said judge before the allotment of the case suspended the operation of said injunction by a written order to that effect on the same day that the injunction was granted.

That the injunction granted was not a matter of right, and was within the discretion of the judge to whom the application was presented to refuse or grant the same, and that before the allotment of the case the judge who originally granted the writ had the right to either revoke or modify the same, such order being entirely within his control and power of modification or revocation.

That said judge having the authority previous to the allotment of the case to modify or revoke such order, could modify, revoke or

suspend the same, either upon a representation of facts made to him or without such representation, and could do so either with or without notice to the parties in interest and a contradictory trial upon the question whether the injunction should be suspended.

That the judge had the absolute power to revoke or modify this class of injunctions, and to hold that he could only do so after notice and hearing of the parties upon the question of fact presented for the issuance of the injunction, would be to deny his discretion and power to revoke or modify the order of injunction, and would deny him the power to set aside an injunction improvidently granted until after the delays which are always usual in rule, contradictorily granted, and the trial thereof, and would result in the party enjoined suffering all the injury resulting therefrom pending the trial and decision on any rules which might be taken.

That the said judge having the absolute power to revoke or modify the said order of injunction, the exercise of such power is not affected by the fact that he states in the order that he does so upon the statement of certain facts made to him, but the question is whether upon the face of the petition as presented, the case was of such a character as authorized the judge either to grant or refuse the injunction. That to hold that the judge who originally granted the injunction had no right or authority to set it aside, would be to hold that an injunction, no matter how improvidently granted, would have to stand until allotment was made.

That in the order suspending the injunction the judge made such suspension (as shown in the order) until further orders of court and after further hearing.

That under the said order of suspension, relators had the right and were reserved the right to apply and move for reinstatement of the original order of injunction, and that he, the respondent judge, had been ready at any and all times to receive and consider such application, but that no such application had been filed by relators. That the Hon. N. H. Rightor having granted the original order of injunction and having suspended the same, and the case having been subsequently allotted to respondent and an application for a suspensive appeal having been made, respondent in his discretion refused such suspensive appeal, and relators are not entitled to a *mandamus* to compel the granting of the same, as the granting of the injunction and the modifying of the same was within the discretion of the Civil

District Court, and to grant a suspensive appeal would be to control that discretion and to reinstate an injunction which the lower court had in its discretion decided should be revoked and suspended.

That the injunction sought by relators was in its nature mandatory, as while the injunction is directed against the defendant, Walsh, to restrain him from using and enjoying the possession of the premises, still, if reinstated, it would have the effect of ousting him from a possession which relators admit he now has.

That the injunction being thus mandatory in its nature should not be issued until after legal trial upon its merits. The respondent judge relies upon the case of State *ex rel.* Koehl vs. King, 45 An., recently decided by this court, as supporting these views.

An examination of the petition of relators, upon which they obtained the order of injunction, shows that they averred that they were creditors of the Runkel-Hoerner Company, Limited; that under writs of attachment they had seized certain property of that company, including especially the leases and rights of occupancy of the premises Nos. 145 Canal street and 7 and 9 Bourbon street, in the city of New Orleans, which leases and rights of occupancy were worth about $25,000. That unless they are able in due course of law to sell and realize upon said leases and rights of occupancy all their claims against said company will not be paid in full. That W. P. Walsh, a resident of New York, temporarily in New Orleans, had taken possession of said premises without right or authority and had announced his intention of carrying on business in the same, commencing on Tuesday, January 2, 1894. That they would be irreparably injured should he be allowed to continue the possession and use of said property, and that they have no relief save in the equitable writ of injunction. That when Walsh purchased the contents of said stores he was notified that he would have a reasonable time, not exceeding two weeks, within which to remove said goods from said premises, but that he had announced his intention of carrying on business and selling said goods regardless of said notice and regardless of their rights and those of other creditors of the said company.

Their petition closed with the prayer that an injunction issue enjoining and restraining Walsh, his agents, clerks and employés from carrying on business in the said premises and from making any use of the same except for the purpose of preparing for the removal therefrom of the goods therein belonging to him. That after due

proceedings the said injunction be by judgment perpetuated, with reservation of their right to sue Walsh for whatever loss or damage they may have sustained by reason of his retention or occupancy of the premises.

The allegations of this last petition, like those of the petition in the present proceeding, are exceedingly indefinite. They do not set out all the facts of the case, and we are forced to gather these facts, as best we may, from the various records or fragments of records which the respondent judge has sent up.

The answer of the respondent, Walsh, verified by the oath of one of his attorneys, makes the following allegations:

Respondent would for further answer state the facts in connection with this litigation—a litigation of which the injunction sued out by A. Lehman & Co. *et al.* was but a branch or incident.

Respondent shows that in the cases styled Sweetser, Pembroke & Co. vs. The Runkel-Hoerner Company, Limited, and the H. B. Claflin Co. vs. The Runkel-Hoerner Company, Limited, attachments were issued from the United States Circuit Court for the Fifth Circuit and Eastern District of Louisiana, and levied upon the stock of merchandise and fixtures contained in the premises now occupied by your respondent; that subsequently suits were instituted and provisional seizures issued in the cases styled Joseph R. Mitchel vs. Amos Runkel, and Mrs. Sarah E. Atkins vs. Amos Runkel in the said United States court, on demands for rent, in the former case of the Bourbon street premises and in the latter case of the Canal street store now occupied by your respondent; that judgments were obtained in the United States court recognizing the lessor's privilege and pledge upon the stock of merchandise and all movable effects in said leased premises; that the same were sold at marshal's sale under said judgments and writs of *fieri facias* issued thereon on the 26th day of December, 1893; that previous to the sale A. Lehman & Co. filed interventions in the cases of Sweetser, Pembroke & Co. and the H. B. Claflin Co. vs. the Runkel-Hoerner Company setting up that the attachments issued therein should be dissolved on account of liquidators having been appointed in the State court and all the property and effects of the Runkel-Hoerner Company having been ordered to be placed in the possession of said liquidators and receivers, collusion, etc.; that the said interventions and attachment cases of Sweetser, Pembroke & Co. and the

H. B. Claflin Co. were regularly put at issue and tried, and judgments were rendered maintaining said attachments and dismissing the interventions—the seizures under the attachments having been made prior to the appointment and qualification of liquidators and receivers; that at the said sale by the United States marshal respondent purchased the stock of merchandise and fixtures for a sum exceeding $50,000 and paid cash therefor; that at and during the sale of said stock and after the marshal had announced the terms thereof, G. Lehman, of the firm of A. Lehman & Co., asked the marshal whether the purchaser would be allowed to occupy the premises after the sale, and that the marshal responded that the purchaser would be allowed to have possession of the premises for two weeks or possibly longer, and that if he continued any longer he would have to obtain the consent of the landlord or parties interested; that in the said suits of Sweetser, Pembroke & Co. and the H. B. Claflin Co., and under the attachments issued therein, the right of occupancy now in controversy was seized by the United States marshal; that in the said suits in the United States court the liquidators appeared and filed exceptions setting up that on account of the Runkel-Hoerner Company having gone into liquidation the attachments should be dissolved, which exceptions were overruled by the court and final judgment rendered in said cases in favor of Sweetser, Pembroke & Co. and the H. B. Claflin Co., and against the defendants and the intervenors, A. Lehman & Co. *et al.*, the appointment and qualification of the liquidators being subsequent to the attachment and seizures thereunder in the United States court; that subsequent to the purchase by respondent of the said stock of merchandise and fixtures A. Lehman & Co. *et al.* appeared in the United States court and took a rule upon the United States marshal and respondent to show cause why they should not vacate the premises now occupied by respondent; that subsequently under the attachment proceedings in the Civil District Court for the parish of Orleans, Division A, wherein the said A. Lehman & Co. *et al.* have secured attachments, the said parties took a rule upon the defendant, the Runkel-Hoerner Company, to show cause why the right of occupancy should not be sold in their case as perishable, and that said rule was discharged, the judge of *Division A* transferring all the attachments in his said division to *Division E*, in which division the liquidators and receivers had been appointed and qualified for the Runkel-Hoerner Company.

Respondent avers that he is occupying the said premises under permission from the United States marshal and under agreement with the liquidators and receivers of the Runkel-Hoerner Co. to pay the same rent that was agreed to be paid prior to the institution of said attachment proceedings against said company, and also with the consent of the landlord and original tenant, Amos Runkel, and with the understanding that when the right of occupancy of the leased premises was sold respondent would vacate the premises. That relators were absolutely without right to enjoin respondent from occupying or enjoying the premises, and they could suffer no irreparable injury by reason of the refusal to grant the injunction, or suspend the same after its granting, leaving out the question as to the granting or suspension of the same being within the discretion of the judge of the lower court.

In their petitions of intervention and third opposition filed in the United States Circuit Court on the 21st December, 1893, in the Sweetser, Pembroke & Co. and the H. B. Claflin Co. cases, relators averred that on the 13th November, 1893, writs of attachment issued in these cases under which the United States marshal took actual possession of the movable property of the Runkel-Hoerner Company contained in No. 145 Canal and Nos. 7 and 9 Bourbon streets, and that the same was at the time of the filing of said opposition and had been since the 13th November in his possession; that on the next day and at subsequent dates they had obtained writs of attachment, some in the Civil District Court, others in the First City Court, under which writs the said property was seized by the civil sheriff and the constable by notices of seizure served upon the defendant and the United States marshal, the last named notices being accompanied by service of a petition with interrogatories and citations, it being impossible for the sheriff and constable to make a physical seizure of said property owing to the fact that the same was under the control of the marshal.

The injunction proceeding below having been assigned to and being lodged in Division "B" of the Civil District Court when relators' petition was filed here, the judge of that division is the proper one with whom contradictorily to test by *certiorari* the order of Judge Rightor complained of. The fact that that judge has not made the answer or return in this case has left us without knowledge of the reasons which induced him to suspend the original order he had granted.

We think it quite likely that when he did so he was under the impression it had not yet been executed. It may be that the judge having had his attention directed to the fact that the first order had been granted on the 1st of January was doubtful as to the legality of that order, and of any action to be predicated on it, or that under the facts of the particular case, the injunction being an incident of prior existing litigation in other divisions, he may have conceived that the parties should have addressed themselves to some other judge. Whatever his reasons we do not think that from the standpoint of "power" the second order can be successfully attacked.

Relators selected the particular judge for the granting of the injunction—they maintain here that his original action was valid and legal. If so the judge did not exhaust his powers in the premises, but retained control of the proceeding up to the allotment of the case.

In State *ex rel.* Buisson vs. Lazarus, Judge, 33 An. 419, as in Mengelle vs. Abadie, 45 An. 678, this court said that "the power to issue the writ when vested in a judge implies that of dissolving it," and in the former case we maintained the right of the judge who had granted an injunction in the absence of the particular judge, to whom it had been allotted, to rescind the order.

It certainly was never contemplated, and we could not hold that an *ex parte* order of a judge which might have been improvidently granted, which might in fact be an absolute nullity, working the greatest injury, should be forcedly given full effect to until it could be set aside by regular proceedings with the usual notices and delays by the judge to whom the case would be ultimately allotted. Black on Judgments, Vol. 1, Ch. 14, Secs. 297, 308.

The power to rescind or modify is something other and different from the rightful exercise of the power either as to the manner in which the rescission or modification was made or as to its correctness.

In State *ex rel.* Moore vs. Judge, 37 An. 119, we said that "it was well established as a rule that notice to dissolve an injunction should be given to the party who obtained the writ," but we immediately added "although in extreme cases the judge, in his discretion, may dissolve at chambers and *ex parte.*"

In Baldwin vs. Bellocq, 35 An. 983, we said: "There is no doubt that a judge has the right and power on an *ex parte* application in a case of urgency to dissolve an injunction on bond, but in such in-

stances the dissolution being at the risk of the mover will be rescinded on a proper showing of error either in the lower or appellate court, and the matter reinstated to be proceeded with contradictorily. It is decidedly preferable that such course be pursued where circumstances will allow."

These authorities show that a legal "power" exists in a district judge to dissolve even, "*ex parte*" orders of injunction which he has granted, though the power, it is stated, must be very carefully and cautiously exercised.

The duty of the court to give "notice" at once to parties in interest of the action so taken is referred to in State *ex rel.* Moore *vs.* Judge, 37 An. 118, and is manifest. The action itself is of course subject to review and supervision in proper cases, through remedies varying under different circumstances.

It is claimed that *ex parte* orders for the rescission of even *ex parte* injunctions are unauthorized; that great and irreparable injury would necessarily follow from such a practice. Cases can be easily imagined, however, where an *inflexible rule* that such orders should continue in force until contradictorily vacated or modified, might be productive of still greater wrong and injury.

We think the rights of all parties are fairly guarded and protected in this State under the discretionary powers of the district judges over such questions, supplemented, as they are, by the supervisory control over inferior tribunals which has been given to this court.

Our powers under Art. 90 of the Constitution are not limited in proper cases to writs of *certiorari*, prohibition, *mandamus* and *quo warranto*, but are expressly declared by that article to extend to other remedial writs.

In State *ex rel.* Murray vs. Judge, 36 An. 578, we said that this court could issue a restraining order which would have the effect of an injunction asked for but refused below, and issue a *mandamus* directly to the district judge to allow the injunction *in limine* whenever a proper state of facts is presented and all the requirements of the law have been complied with; that it was manifest that cases might be presented in which justice and reason required that some mode should exist of redressing at once the wrong or abuse of power of the district judge, even if there be other means of relief, if the slowness of ordinary legal forms would produce such a delay that the administration of justice might suffer from it.

We do not propose to enter here into any extended examination or discussion of "judges'" orders, "court" orders, of orders rendered "*ex parte*" and those "contradictorily" obtained. It suffices to say that the order first granted herein by Judge Rightor was not technically a judgment (State *ex rel.* Behan vs. Judges, 35 An. 1077, 1078), and even though it should not have been properly suspended the error was not covered or reached by a claim that there is an absolute want of power in a district judge to *vacate or modify ex parte under any circumstances any order of injunction* which he had previously rendered. It is not legally essentially necessary that such orders should in all cases be modified or vacated contradictorily with those in whose favor they have been issued. It is not true that the mere failure to give prior notice to such parties would carry with it, as the inevitable consequence of that fact, the absolute nullity of the modifying order as for want of *legal power* in the judge over the whole subject matter. Black on Judgments, Ch. 1, Sec. 1, p. 5; Ch. 14, Secs. 297 and 308; Craddock vs. Croghan, 1 Sneed (Ky.) 100; Clagget vs. Simes, 25 N. H. 402.

We are next to enquire whether in the exercise of his "power" of *ex parte* revocation or modification the judge has applied the power to a particular case in which he was not legally authorized to do so, so as to authorize a review of his action through the instrumentality of a writ of *certiorari*.

We understand relators to claim that there is a CLASS OF CASES such as leave no discretion in the district judge to determine whether he would or would not grant an injunction asked when the facts are properly alleged and sworn to, and that the present case falls under that class. That the same reasons which withdraw from him in that class of cases all discretion as to granting the injunction also withdraw absolutely from him the authority to modify or revoke *ex parte* the injunction which he has directed to issue. The fact that a particular case, when properly presented to a judge, may be of such a character as to make it his duty to issne an order of injunction does not exact that the injunction should necessarily be continued until final hearing. Whilst the injury complained of may justify an injunction it may not be such as to work irreparable injury. The judge, therefore, even in such cases, has some power of action in the matter. It may be that he would not have the authority for any reason dependent upon the merits of the case to definitively dissolve the in-

junction, but he would have the right to entertain and act upon an application to dissolve on bond, and it would not be essentially necessary, as we have said, though generally right and proper to have the same disposed of contradictorily. The falling of a particular case under the class referred to would not necessarily be determinative of the question of the legality of notice prior to action. Whether in such case the judge would have acted legally in proceeding *ex parte* would depend upon its particular facts and the grounds upon which the action was based.

In dealing with that question the fact must not be overlooked that the modification or revocation of the order may be grounded on causes extrinsic to the merits of the injunction. The judge, for reasons entirely independent of the merits, may reach the conclusion that the order of injunction was improvidently and illegally issued by him, and we should, if possible, be advised of those reasons by parties who, appealing to our supervisory powers, seek at our hands a restraining order pending the examination of the issues submitted to us. They should, as far as practicable, place the whole case before us. We consider such a requirement conservative—tending to secure the rights of all parties and to further the proper administration of justice by enabling us speedily, through the reasons assigned below by the district judge, to come to a correct knowledge of the situation and to act advisedly.

In the present case relators did not exhaust their remedy in the court below nor seek the obvious relief which was directly before them and which they could doubtless have speedily obtained there if entitled to the same. (State *ex rel.* Shakspeare vs. Judge, 40 An. 607; State *ex rel.* Waterworks vs. Levy, 36 An. 944).

The order of injunction granted was not absolute. Defendant was enjoined "until further orders of the court." The second order was not absolute—it suspended the injunction "until further orders of court after hearing." Relators took no steps whatever to have the suspending order revoked or to obtain the hearing reserved and obviously tendered, but applied at once for a suspensive appeal, following the refusal thereof by this application to us. The second order was not a denial of the injunction. It merely postponed matters for a short period to enable the replacing judge to advise parties whose right to be heard was surely as great as that of the relators' to be heard, of the pending application so as to guard their interests.

We think that under the circumstances of this case, relators, before making an appeal to us, should have *applied at least* for the revocation of the order complained of. In some States such a prior application for the revocation of an order complained of is made a condition precedent to the granting of even an ordinary appeal. See Bostick vs. Knight, 40 N. W. Rep. 345; Black Hills Flume & Min. Co. vs. Grand Island & W. C. R. Co., 51 N. W. Rep. 341, 342, 343, 345.

We have ourselves established as a rule of practice that applications to us for relief against the actions of a court charged as being in excess of power and usurpations of jurisdiction would not be generally entertained unless exception had been made below to the want of power or jurisdiction and the same had been overruled.

We do not know upon what grounds Judge Rightor acted in this matter, and as he might have been authorized and justified for a number of reasons which we can readily imagine, in giving the second order, we can not set it aside in this proceeding.

Relators complain that even if the second order were not reviewable by this court under its supervisory powers, they were entitled to appeal suspensively from the same, and this appeal was unjustifiably refused.

It would appear that the Runkel-Hoerner Company were the lessees of the premises Nos. 7 and 9 Bourbon street and No. 145 Canal street, and had therein a stock of merchandise. That on the 18th November, 1893, under writs of attachment issuing from the United States Circuit Court at the instance of several creditors of that company, the stock of goods mentioned and the right of occupancy of the said premises were seized, and the premises and stock of goods were taken possession of by the marshal. That upon the next day (November 14) the company went into liquidation in Division "E" of the court, and receivers or liquidators were appointed by and confirmed in that division. That on the 14th November, 1893, and at various dates since. under writs of attachment issuing from the Civil District Court for the parish of Orleans, the same property, with the right of occupancy, was seized by the civil sheriff of the parish through notices of seizure served upon the marshal, the notices being accompanied by service of petitions with interrogatories attached; actual possession of the property not having been taken by reason of the prior holding of the same by the marshal.

That subsequently, under proceedings taken out in the United

States Circuit Court by the lessors of the premises occupied, the stock of goods was sold at public auction and was purchased and taken possession of in the premises by one W. P. Walsh. That Walsh still occupies the stores with the goods purchased by him, and is duly selling the same therein. That the seizures made by the marshal are still in full force. That the occupancy of Walsh is under the consent and with the permission of the marshal, the receivers and the landlord, and that Walsh recognizes that it will terminate upon the sale of the right of occupancy, and admits that it will be his duty to vacate the premises upon the happening of that event. Furthermore, that all the various suits and attachments connected with the company have been transferred to and are now before Division "E" of the Civil District Court, where the proceedings in liquidation of the Runkel-Hoerner Co. are still pending.

Relators have not explained to us in their brief how their interests would be prejudiced by the temporary occupancy of the premises by Walsh under the circumstances, nor how they would be advanced by having the injunction maintained. The premises are still in the possession of the marshal, under seizure, and if he chooses (particularly if the landlord and receiver consent) to permit Walsh to act as a *quasi* keeper or tenant, we do not see either the interest or the right of the relators to have him ousted by *ex parte* proceedings directed against him. Railroad Company vs. Railroad Company, 36 An. 561.

For the reasons herein assigned it is ordered, adjudged and decreed that the provisional orders and writs be set aside and relators' applications be rejected at their costs.

No. 11,345.

MRS. HENRIETTA HELM, INDIVIDUALLY AND AS TUTRIX, VS. EDWARD AND JAMES O'ROURKE.

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Where a widow sues for the death of her husband, caused by negligence of defendants, there is no misjoinder of parties plaintiff, if she sues individually and as tutrix of her minor child, issue of her marriage with deceased.

Where the parties are liable *in solido*, and each is cited, they are all before the court, and the fact that the petition alleges that the injury was inflicted by a commercial firm, composed of the individuals who are liable, is not sufficient for the dismissal of the suit, although the firm had been dissolved at the time of the institution of the suit. The petition discloses a cause of action when it set

out the manner in which the deceased was killed and charges negligence on part of defendants, and the absence of contributory negligence on part of deceased.

A servant, an "all-around workman," subject to the orders and directions of the master, whenever he is called upon to work in pursuance of conditions created by the master, has the right to assume superior knowledge, judgment and skill in the master, under whose orders he is immediately acting, and to believe that he will be protected from danger.

APPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

T. M. Gill for Plaintiff and Appellee:

1. Knowledge, experience, care and skill are required in testing a boiler. U. S. Revised Statutes, Sections 4404, 4418, 4427, 4429, and 4429. Edward's Steam Engineer's Guide, pp. 126-127, quoted pp. 15-16 of this brief.
2. It was the act of the O'Rourkes that caused the damages, and they must repair it. R. C. C. 2315.
3. Mr. Webster's definition of the word USE is: "The act of handling or employing in any manner or for any purpose." The demolisher of a building is not using (to adopt defendant's construction of the word) the building, but demolishing to convert its material into marketable lumber—*to sell it for use*—yet he is liable for any damages he may cause. 39 A. 1011.
4. It was the duty of Frank Helm to go to Edward O'Rourke whenever he called him. The master orders and the servant obeys and executes. 112 U. S. 398.
5. Servant has the right to assume superior knowledge, prudence, judgment and skill in his master, and that the master will not jeopard his life or person but guard him from all danger. The master's duty is to know the danger, if any exists. He can't require superior knowledge, judgment or skill from his servant. Servants are only required to know of patent but not latent defects, and if he knows of defects it would not bar recovery, unless he knew they were necessarily dangerous. It is absolutely necessary, to bar recovery, that the master should be free from all negligence, even if the servant assumed the risk in his employment. 39 A 1011; 37 A. 635; 40 A. 182 to 183; 106 U. S. 700-702; 41 A. 964; 100 U. S. 216, *et seq.*; 112 U. S. 298; 12 F. R. 732; 48 F. R. 914, 919; 116 U. S. 642.
6. The burden was upon defendants to prove for what F. Helm was employed, to prove if he was employed to test or witness the testing of boilers, and that he had the capacity to do so, etc., and that Edward O'Rourke had the skill to test boilers and was free from all fault. Having made no groof of the above requirements the presumptions are against them. 15 A. 664; 35 A. 841; 20 A. 96.
7. The judgment is small for the damages suffered. Twenty-five hundred dollars has been allowed for eighteen hours' suffering. 36 A. 708. Helm suffered 168 hours. This authority would authorize $23,333.33 1-3 damages.

Jas. Timony and *Moise & Cohn* for Defendants and Appellants:

1. (*a*) Whatever is necessary to be alleged to show a cause of action must be expressly alleged.
   (*b*) Inference and implication can not be used in lieu of positive allegation.

2. No fact can be shown unless it has been alleged. 1 L. 214; 4 R. 465; 9 An. 117; 14 An. 355.
3. (*a*) The allegations of a petition should exclude every hypothesis upon which the non-liability of defendant could be predicated.
   (*b*) Its allegations should be such that defendant admitting them, and the law justifying, judgment should go against him.
4. (*a*) Whatever must be proved in order to recover must necessarily be alleged. 5 M. 691; 13 L. 52; 2 R. 498; 4 R. 428; 1 An. 556; 13 An. 124; 14 An. 120; 20 An. 354; 24 An. 159.
   (*b*) If facts alleged are not sufficient when proven to recover, the petition necessarily shows no cause of action.
5. (*a*) The plaintiff is presumed to have stated every fact which he can prove.
   (*b*) Facts not stated it will be presumed did not exist
6. A skilful mechanic, employé in a boiler manufacturing establishment, called on to witness the "testing" of an old boiler by his employer, takes the risk of his employment in answering the call, and can not complain if injured by its explosion during the operation, when the danger was not increased by any fault of the employer, and the method of testing was not unusual or uncommon.
7. (*a*) The boiler was being tested and deceased was called onto witness the test.
   (*b*) No allegation in petition of fault or negligence in the operation of testing.
   (*c*) No allegation that it was not part of deceased's duty or function of his employment.
   (*d*) No allegation that deceased was not familiar with operation of "testing."
   (*e*) An allegation that he was skilful, necessarily must have known.
   (*f*) No allegation danger was increased.
8. (*a*) The court will take judicial notice that in boiler works boilers are tested.
   BECAUSE 1st. The United States Government requires it for marine boilers.
   2d. The city government did require it.
   3d. It would be negligence not to test. 9 Fed. 877; 10 Fed. 140.
9. (*a*) The court will not presume it uncommon or unusual, in order to aid a petion, when it does not so allege it to be.
   (*b*) To have sold or used an old, rejected and condemned boiler without "testing" before or after repairing would have been criminal negligence.
   (*c*) It is the obligatory duty of a boiler maker to test.
10. (*a*) No allegation of cause or reason for calling deceased.
    (*b*) Allegation that he was skilful.
    (*c*) Presumption called for a purpose.
    (*d*) That purpose founded on his skilfulness.
11. (*a*) No allegation that employer had no right to call him.
    (*b*) If without right deceased could have refused to come.
    (*c*) Coming, therefore, he voluntarily assumed the risk.
12. (*a*) No allegation that testing was before or after repairing.
    (*b*) No allegation that it was with cold or hot water—steam or compressed air.
13. The object of "testing" is to test.
14. (*a*) To test a thing is to try its strength, power and endurance, also its weakness.
    (*b*) To test a boiler is experimenting by pressure to see what pressure it will stand.
    (*c*) The fact of "testing" is putting a doubt into action; to verify its truth or demonstrate its falsity.

(*d*) To test a boiler is to propound to it interrogatories in the shape of deeds and to take results for answers.

(*e*) To test a boiler is to probe it for unseen defects.

15. An essential and necessary part of defendant's business was to test, not only as part but as an obligatory duty.
16. Deceased was called to witness the questions in the shape of deeds, put to the boiler, and necessarily to hear the answers, in the form of results.
17. The boiler was not in use, nor being used.
18. The fact of "testing" shows an intent to use, if fitted for use, which denies its use and concedes its unfitness for use.
19. This is not an action for the use of defective machinery.
20. The petition does not charge the boiler unfit for "testing."
21. Testing a boiler involves danger.
22. Employés assume the risks incident to their employment, and unless the employer increases those risks he is not liable for injuries resulting. 39 An. 156; 35 An. 1166; Rorer on R. R. 1198; Pierce on R. R. 379; 109 U. S. 484.
23. A man voluntarily assuming a position of danger can not recover for injuries. 17 Fed. 882; 24 Fed. 309, 906, 124—and authorities in brief.
24. An employé knows the risk of the business as well as an employer. See Lord Abinger's ruling cited approvingly by our court (in brief).

The opinion of the court was delivered by

McENERY, J. The petitioner alleges that the defendants, composing the commercial firm of Edward & James O'Rourke, are indebted to her individually and as tutrix of her minor child in the sum of twenty thousand dollars, "for this, that on or about the 16th day of May, 1891, while petitioner's husband, Frank M. Helm, was working at the furnace where he was employed in the boiler works of the aforesaid firm of Edward & James O'Rourke, in this city, he was called from said work by Edward O'Rourke, a member of said firm of Edward & James O'Rourke to witness the testing of a boiler, which, upon his arrival exploded and he was thrown many feet distant and struck by many fragments of said boiler, and so injured, notwithstanding the best of medical skill and care, as to cause his death, after suffering seven days great pain and agony, on or about the 23d of May, 1891. * * * * *

"That petitioner's husband was guilty of no fault, but that all the injuries, suffering, agonies, death and damages aforesaid were caused solely by the carelessness, imprudence, gross negligence, fault and want of skill of the aforesaid firm of Edward & James O'Rourke, and Edward and James O'Rourke individually. That said boiler was old, rejected and condemned before the purchase of the same by the said defendant firm of Edward & James O'Rourke, and was not only

unsafe, but utterly unfit for use, as they well knew, and which petitioner's husband did not know."

The prayer is for judgment for said sum of $20,000 against the commercial firm of Edward & James O'Rourke and James O'Rourke, individually, *in solido*, and for the same amount jointly against the heirs of Edward O'Rourke, deceased.

The defendants were all cited and were before the court.

To this petition exceptions were filed—first, that at the time of the service of the petition and citation the firm had been dissolved, and that the defendant James O'Rourke had no authority to answer for said firm, and that he could not be cited with another party, but that citation and petition should be served on him separately. The defendants, if liable, were bound *in solido*. They were all cited. All parties in interest were therefore before the court.

Second, that the petition is vague and shows no cause of action, and that it is a misjoinder of parties plaintiff. The petition is explicit in showing the manner in which the deceased, Frank Helm, met his death, and it explicitly charges and avers that it was caused by the negligence of defendants. The only facts at issue were the negligence of defendants, and the absence of contributory negligence on the part of deceased. The first is averred and the second negatived by averments. There was no misjoinder of parties plaintiff, as both the widow and child have an interest in the damages if any were due for the death of the husband and father.

The exceptions, therefore, were properly overruled.

The defendants answered, pleading a general denial and specially averring that the testing of the boiler was done by defendant's brother and partner, who was seriously injured at the time the explosion occurred; that Frank M. Helm was a skilled mechanic; that he had inspected the boiler, and from his report Edward O'Rourke believed the boiler could stand the test; that the explosion was caused by no fault of defendants, and that the accident was one of that character which is the risk of the business in which said Helm was engaged; that the boiler had been repaired according to the instructions of said deceased Helm, and many repairs were put on the same which he had not recommended, and that it was thoroughly repaired when tested, and that the explosion was one of those accidents which will happen in despite of every care and caution. Contributory negligence on the part of Helm, the deceased, is also averred.

There were four trials by jury. The first trial was in favor of plaintiff, the jury returning a verdict of $8000. This was set aside. The case was again tried on the same evidence by agreement of counsel, and a verdict in favor of plaintiff for $20,000 was returned. A new trial was granted. On the third trial the jury failed to agree, and on the fourth and last trial, on the same evidence, a verdict was returned for $8000 and a judgment in favor of plaintiff rendered thereon. From this judgment defendants appealed.

The firm of James & Edward O'Rourke were engaged in making new boilers, buying second-hand boilers and repairing them if necessary, for sale, and repairing boilers for other parties. The firm bought two boilers from a blacksmith in Algiers. These boilers had been used for many years on the McLellan Dry Dock, and had undergone many repairs. They had become useless, worn out and rotten to the extent that they could no longer be repaired, and were discarded and condemned by the owners. They were unsalable, even for old iron, and to get rid of them arrangements had been made to throw them in the river. Finally they were given to the blacksmith Daniels, to be used as water tanks. From Daniels, Edward & James O'Rourke purchased them for a trifling sum. These boilers were moved to the works of the defendants and remained there some time before repairs were made upon them. During this time, until a short time before the test which ended so tragically, Frank M. Helm, the deceased, was not employed at the boiler works, and it is not shown that he was acquainted with the history of the boilers. Frank M. Helm was employed at the furnace. He was a skilled mechanic, and handy at any work about the establishment. He was, as stated in the testimony, an "all-around man." It was not his special business to test boilers. Edward and James O'Rourke were their own foremen, and the employees of the establishment acted under their instructions and obeyed their orders, doing what work was imposed upon them by their employers.

It appears by the testimony of James O'Rourke that it was not the business of any particular employee to test the boilers, and that a workman who happened to be out of a job was selected for this purpose. The deceased, Helm, was not out of a job, as he was employed at the furnace. It does not appear by the testimony, except that of James O'Rourke, that Helm, the deceased, worked on this boiler, which was purchased from the blacksmith, Daniels.

Those who worked on the boiler named George Helm, brother of deceased, as the mechanic who did the work on it, putting in the new crown sheet and some of the braces, which were made by Frank M. Helm at the furnace or forge. There is some confusion in the testimony as to whether there was one or two cold water tests of the boiler. But there was certainly one, made after the new crown sheet was put in, under a pressure, stated by one witness, at sixty-five pounds, and another at thirty. Under this test the boiler gave way, and Edward O'Rourke ordered George Helm to caulk, that is to rivet the defective point in the boiler. The defect was in the old iron. After the explosion the boiler gave evidence that it was the old iron around the new crown sheet which gave way.

Experts who, from the responsible positions they occupy, are familiar with the testing of boilers say that after defects have been shown by the cold water test it would be unsafe, in fact rash, to resort to the steam test which the boiler was undergoing the day after the cold water test without repairing the defective portions of the boiler. And these experts also state that no more steam pressure should be employed in testing than that used in the cold water test. P. H. Kelly, a boiler maker and superintendent of the Whitney Iron Works, says that no practical man will test a boiler by steam pressure before he has convinced himself by hydrostatic test that the boiler will hold a certain amount of hydrostatic pressure.

It does not appear that after the cold water test and the defects were exhibited, and the boiler caulked or riveted, that any other hydrostatic test was made, but that a steam test was employed the next day at a pressure of at least eighty-five pounds.

We conclude that the defendants were negligent in attempting to test an old boiler beyond the ability of any one to repair or make safe, and that they were negligent in putting on the steam test at a pressure in excess of the hydrostatic test, even if the boiler had shown no defects by said test. And that they were grossly negligent after the defect by hydrostatic test had been exhibited, by resorting to the steam test without satisfying themselves again, after the repairs, by hydrostatic pressure, that it was safe to resort to the steam test. Phillips vs. Ill. C. R. R. 49 Ill. 234.

Frank M. Helm, the deceased, was employed at the forge or furnace, and was going to his work at the forge, and was some thirty feet away from the boiler when Edward O'Rourke called to him and

said he wanted him. He responded to this call and went to Edward O'Rourke, who was superintending the testing of the boiler by steam. At this time there were eighty-five pounds pressure on the boiler and Edward O'Rourke instructed Claude Helm to put on one hundred pounds pressure. He started to put on more steam, and it was at this time that his brother, Frank M. Helm, was called by Edward O'Rourke. Claude Helm was instructed to call James O'Rourke, the other member of the firm. Frank M. Helm and Edward O'Rourke were left standing at the boiler, when he left to call James O'Rourke. He was in the office not very far away, and started immediately with Claude Helm to where the boiler was being tested, when within thirty feet of the boiler it exploded.

It is in evidence that the employees of defendants' establishment obeyed what orders were issued, and that Frank M. Helm being handy and expert in all things connected with boiler making was called upon to do almost any kind of a job.

But it was not his business to test boilers. He was not employed specially for this purpose. This duty was assumed by Edward O'Rourke. Frank M. Helm took no part in directing the operations, but was present by invitation of his master and superior, and was under his orders. He was not, therefore, employed in an occupation, the risks of which he assumed. The authorities cited by defendants have no bearing on this point, as the facts do not bring the case within them. Frank M. Helm being in the service of defendants as a general all-around workman, subject to the orders and directions of his superiors, whenever he was called upon to work in the presence of conditions created by his master and superior, had the right to assume superior knowledge, skill and judgment in his superior, under whose orders he was immediately acting, and that he would not expose him to needless danger.

In the case of Tutrix vs. Sellers & Co., 39 An. 1011, Mr. Justice Fenner, in an elaborate and able opinion, thus states the law:

"When the master has created the danger he is bound to guard against it, and if he himself does not know or believe that the danger exists he can not require superior knowledge and judgment from the servant."

To review the instant case at length would be only to repeat the views expressed in the opinion of Tutrix vs. Sellers, and a collation and reference to the authorities cited.

It is only necessary to state that the defendants created the danger which the deceased, Helm, was instructed and ordered to confront. They are therefore liable in damages for their negligence in putting in operation cause which led to the death of Frank M. Helm.

There are circumstances attending this case that impress us with the belief that the amount of damages assessed by the jury is excessive. The verdict of the jury was probably induced by testimony permitted to go to the jury showing the amount of property owned by defendants.

We will amend the judgment and fix the amount of damages at three thousand dollars.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be amended so as to fix the amount of damages at three thousand dollars; in all other respects the judgment is affirmed, appellees to pay costs of appeal.

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No. 11,339.

GEORGE F. HERBER VS. PHILIP THOMPSON ON INTERVENTIONS AND THIRD OPPOSITIONS OF J. & M. SCHWABACHER, THE ULMAN GOULDSBOUGH CO., LIMITED, AND H. L. BIDSTRUP.

Third opponents, before the sale, inconsistently asked for the nullity of the sale on the ground of simulation, etc., and also asked for the proceeds; after the sale to one who declares himself the owner of the mortgage notes under which the sale was made and who, having bid less than his debt, paid no price, third opponents filed amended petitions in which they allege that the adjudicatee was aware of the simulation, and they restrict their prayer to the annulment of the sale and mortgage, asking for the citation of all parties to the sale. *Held*, that under the circumstances of this case and the pleadings therein, third opponents are not estopped from attacking, by a direct action, the sale and mortgage as being simulated. *Held further*, that in this case the action set forth in the amended petitions contains all the elements of a direct action, affords all the opportunities for exceptions and answer, and affords also the same delays and mode of trial which could be claimed in a direct action.

APPEAL from the Civil District Court, Parish of Orleans.
King, J.

W. S. Benedict, *Robt. G. Dugué* and *James Legendré* for Opponents and Appellants:

Interventions and third oppositions have always been allowed in executory proceedings. 28 An. 646; 43 An. 820; 42 An. 492, 1196; 11 R. 217; 40 An. 149; 15 La. 417; 28 An. 596.

Herber vs. Thompson.

The word "suit" in C. P. 389, 390, 395, and the word "privilege" in Art. 396, are not used in their technical sense. The first means "judicial proceeding," the other "preference." C. P. 401, 402, 403; 14 An. 589.

The legal title to negotiable paper is presumed to be in the holder, who may sue in his own name, subject to the right of the drawer, or other persons interested, to urge against him all defences and equities they might urge against the real holder. But the presumption may be rebutted, and is rebutted when the holder confesses, in open court, that he has no interest in the paper, and never had any.

No one can invoke the aid of judicial process unless he has some interest to protect. The interest must endure until after judgment. Hen., p. 1129, Nos. 11, 12, 13; p. 1130, No. 27; 14 An. 811.

When demands are made in the alternative, the pleading is good, and the party can not be made to elect. 27 An. 98; 30 An. 1203; 34 An. 196, 684.

If inconsistent, the only penalty is that the pleader must elect. C. P. 449; 28 An. 312; 7 N. S. 404; 7 An. 568; 3 An. 365; 19 La. 207; 8 An. 48.

Third opponents may allege the nullity of a mortgage and at the same time claim the proceeds of a valid sale thereunder, if such should be made.

A sale under an invalid or extinguished mortgage is good, as to the innocent purchaser for value. 41 An. 555.

A party can not profit by the mistakes of his adversaries due to his own act.

If the purchaser at a judicial sale does not pay the price, as ordered by the court, the sheriff's duty is to re-sell at once. 18 An. 237.

The sheriff can not be ordered to make a deed to an adjudicatee, claiming to hold the first encumbrance on the property, who, for that reason, refuses to pay the price, when there is a valid, subsisting order directing him to pay it, and the validity of his mortgage has been put at issue in proceedings which are still pending. 22 An. 573.

Chas. J. Théard for Plaintiff and Appellee:

An intervenor can not question the interest or title of the plaintiff, or his capacity or right to institute the proceedings in which the intervention is filed.

The payment of a promissory note endorsed in blank may be enforced in the name of any person whomsoever, who is in possession of the note. Klein vs. Buckner, 30 An. 680; see also Hunt vs. Stone et al., 19 An., 526; Scionneaux vs. Waguespack, 32 An. 283; Smith vs. Atlas Cordage Co., 41 An. 1.

An intervention can not be filed in an executory process.

Interventions take place in suits, but an order of seizure is not a suit. Chambliss vs. Atchison, 2 An., page 490.

An executory proceeding is not properly a suit; it is not even a judgment in any sense of the word. It is merely the aid of judicial power to give force and effect to what is equivalent to a judgment confessed. Folger et al. vs. Roos, 40 An., page 604; Mitchell vs. Logan, 34 An., page 1003, and authorities therein cited; Rousseau vs. Bourgeois, 28 An. 186.

A third opposition may take place in two cases only: (1) when the opponent claims to be the owner of the thing seized; (2) when he contends that he has a privilege on the proceeds of the thing seized and sold. C. P., Art. 396.

Where the action is to annul a mortgage the party can not proceed by third opposition.

One can not be permitted to claim the proceeds of the sale, and at the same time to aver the illegality of the sale and the nullity of the mortgage for the satisfaction of which the sale is made. Livaudais vs. Livaudais, 3 An. 454; Provosty vs. Carmouche, 22 An. 135; Slocomb vs. Williams, 23 An. 245; Boubede vs. Aymes. 29 An. 274.

The demand for the proceeds is the judicial admission of the legality of the sale, It not only affirms the validity of the sale, but will forever estop the opponent from afterward asserting the nullity of the sale in any subsequent proceeding. Factors and Traders' Ins. Co. vs. DeBlanc et al., 31 An. 100; Massie vs. Brady et al., 41 An. 555.

The purchaser, who is himself the seizing creditor, under a special mortgage first in rank, may retain in his hands the purchase price, up to the amount of his mortgage.

The opinion of the court was delivered by

PARLANGE, J. The plaintiff, holding five promissory notes signed by the defendant, aggregating $25,000, and secured by mortgage on a plantation situated in the parish of St. Landry, obtained an order of seizure and sale from the Civil District Court for the parish of Orleans. Before the sale three creditors of the defendant, holding judgments against him for sums aggregating $16,985.63 and interest, filed their separate petitions of intervention and third opposition in the executory proceedings. They alleged substantially that the plaintiff had no interest in the mortgage notes or in the mortgage, which they charged to be a pure simulation to the knowledge of plaintiff for the purpose of screening defendant's property and its proceeds from the pursuit of his creditors; they further averred that the mortgage, if not simulated, is fraudulent and was resorted to by the defendant while he was in insolvent circumstances to screen his property as stated, to the knowledge of the plaintiff and of the original mortgagee, neither of whom gave any consideration for said notes, and that the opponents had only discovered the facts alleged within two months from the time when they filed their interventions and third oppositions.

The opponents further averred that, if the mortgage was not simulated or fraudulent, or both, and if the notes were ever issued or issued in good faith, which they deny, the notes afterward went back into the possession of the defendant, and that the mortgage has been extinguished by payment, compromise or otherwise. That the property is worth $25,000 and that the defendant is still insolvent, and that any other property he may own is subject to mortgages far in excess of its value, and that opponents will be remediless if the

mortgage on which the executory process issued is not decreed null or to have been extinguished. Each of the opponents prayed that the sheriff of the parish of St. Landry be ordered to hold in his hands, out of the proceeds of the sale, a sufficient sum to pay their judgments, and that "judgment may be rendered decreeing the mortgage * * * to be simulated, null and void, and if not simulated or fraudulent, or both, to have been extinguished by payment, compensation, confusion or otherwise; * * * directing the amount of petitioner's said judgment to be paid in full by privilege and with mortgage * * * out of the proceeds of the sale to be made herein."

To these interventions and third oppositions the plaintiff excepted that no intervention or third opposition could be filed in said matter; that the intervenors can not be heard to question plaintiff's interest or right to institute the suit; that the oppositions set forth inconsistent matters, and are vague and indefinite.

After the sale, the exceptions came on to be tried before the lower judge, and he then allowed the opponents to file supplemental and amended petitions of intervention and third opposition, in which they averred that since filing their original pleadings, they have discovered that the plaintiff disclaims all interest in the notes and mortgage, and that he asserts that he never had any interest therein, and that the only person having any right in the same at the time the executory process issued and since, is the adjudicatee at the sale, who admits the assertion. That a pretended adjudication has been made and the adjudicatee claims ownership thereunder, although he did not pay the price of the adjudication; but that the adjudication is null because he did not pay the price, and, for the reasons stated in the amended petition, the mortgage under which the sale purports to have been made is null and void, or has been extinguished, as the adjudicatee always knew. The opponents further averred that if the mortgage was not originally simulated or fraudulent, the same was paid or extinguished in some way unknown to them, but well known to the adjudicatee, who was thoroughly cognizant of the defendant's insolvency; that the adjudicatee knew at the time he claims to have received the notes and mortgage that the same, if originally good, had been extinguished and could not be revived, and that if the adjudicatee was a creditor of defendant as he claims, he well knew that the defendant could not give him a mortgage, as

he was then, and had been for a long time before, totally insolvent, to the direct knowledge of the adjudicatee. They alleged that these new facts had come to their knowledge since the filing of their original pleadings. They prayed for citation to all the parties, including the adjudicatee, and that the mortgage be declared to be simulated or fraudulent, or both, or extinguished as alleged, and that the sale and adjudication be annulled.

The judge *a quo*, after trial of the exceptions, maintained the same and dismissed the interventions and oppositions, reserving to the opponents "all their rights, if any they have, to be prosecuted according to law." The opponents have appealed.

The property was adjudicated for the sum of $8500. The adjudicatee, notwithstanding the order of the court directing the sheriff to retain sufficient of the proceeds to meet the claim of the opponents, did not pay the price, claiming the right, as holder of the notes, to attribute the price to his mortgage.

If the opponents had taken the risk of the purchase of the plantation by an innocent third person and had awaited the sale without instituting any proceeding, and if, after the sale to one whom they claim to be cognizant of the simulation, they had brought directly such an action as is set forth in the amended petitions, charging the mortgage and the sale to be simulations to the knowledge of all the parties to the proceedings and sale, and asking for the annulment of the mortgage and sale, it is perfectly clear that the opponents would have had their action. This being so, we are to inquire why the amended petitions should not stand. We see but two grounds upon which the dismissal of the amended petitions could be contended for: first, because opponents are estopped from attacking the validity of the sale, for the reason that in their original petitions they ask to be paid out of the proceeds of the sale; and secondly, because opponents, even if not estopped, can not assert their demand in the form which they have adopted.

The plaintiff has cited decisions of this court to show that a party claiming the proceeds of a judicial sale thereby affirms the validity of the sale and is estopped from thereafter contesting it. We have examined those authorities and others, and we do not consider them as in conflict with the views entertained by us in deciding the instant case.

That an innocent purchaser at a judicial sale should be protected

against disturbance by one who has claimed the proceeds of the sale, seems just and equitable. It may well be in such a case that the intending purchaser considered the claim for the proceeds, even when inconsistently joined with a demand for the nullity of the sale, as a virtual assent to the sale and relied upon that assent when he bought.

But estoppels are not favored; and no principle of natural justice or of law has been invoked by which the fact that a third opponent has, prior to the sale, inconsistently claimed the proceeds and also asked for the annulment of the sale, should operate an estoppel for the protection of a purchaser of the property who was cognizant that the sale and the proceedings under which it was had, were simulations.

In a case such as the instant one, where, under a mortgage alleged to be a simulation, a sale is made to one who discloses himself at the sale as the holder of the notes and who bids in the property for a part of his mortgage and does not pay the price, it seems clear that an action charging the adjudicatee with knowledge of the simulation, can be maintained against him to have the sale declared null, even though the parties bringing the action may, prior to the sale, have inconsistently claimed at the same time the proceeds of the sale and asked for the annulment of the sale. The claim for the proceeds could not in any manner injure an adjudicatee who would know that the sale is simulated and he could not be permitted to derive any benefit from the fact that such a claim had been made.

On the question whether the opponents can maintain their action in the form in which it is now embodied in their amended petitions, we were at first inclined to the opinion that the amended petitions should be dismissed, reserving to the opponents the right to bring again, as a separate and independent suit, the same action set out in the amended petitions. But the law does not require the doing of vain and puerile things. The amended petitions contain all the elements and essentials of a separate and direct suit for the annulment of the mortgage and sale. Citation of all the parties concerned is prayed for. These parties will have all the delays and all the opportunities for exceptions and answer, and the same mode of trial to which they would be entitled in a separate action. Besides, under the rules of the Civil District Court, if the suit were filed anew as a separate action it would again be docketed in this very cause, and

assigned to the very judge who tried this cause below. We passed upon a similar point in Morris vs. Cain, 35 An. 759.

We are not to be understood as overruling herein the former decisions of this court holding, in cases of purchases by innocent buyers at judicial sales, that one who has previously claimed the proceeds of the sale is estopped from contesting the validity of the sale. Nor are we unmindful of the decisions of this court holding that one can not by third opposition claim the proceeds of a judicial sale on the ground that the execution is based upon a fraudulent, simulated or extinguished claim. We have no need in this case to pass upon those questions. The only requisites for a decision in this case are the conclusions reached by us that the opponents are not estopped from bringing an action for the annulment of the sale, which they claim has been made to a person cognizant of the fact that the sale is a simulation; and that the action set forth in the amended petitions contains all the elements of a distinct and direct action, and that under the circumstances of this case the amended petitions are to be considered and held as setting forth a direct action.

In the instant case we do not deal in any manner with the merits which were not reached in the court below, and we pass only on the questions presented by the pleadings and record.

It may well be that the allegations of the opponents are entirely unfounded in fact, and that they will fail in their proof. It is not impossible that the action is merely tentative. But with the verity or untruth of the cause of action we are not concerned at the present stage of the case.

It is therefore ordered that this cause be remanded to the lower court to be proceeded with according to law on the demands set forth in the amended and supplemental petitions herein, and that appellees pay the costs of appeal.

DISSENTING OPINION.

BREAUX, J. The able and carefully prepared opinion of the court has not convinced me of the error of the judgment of the court *a qua*.

Before the sale of the property judicial mortgage creditors of the defendant, whose judgments were of record, filed separate petitions of intervention and third opposition, and obtained an order directing

the sheriff to hold in his hands, out of the proceeds of the sale, a sufficient sum to pay their judgments in full, and prayed, after allegations setting forth their claim, that the mortgage under which the property was sold be declared simulated, fraudulent and void, or to have been extinguished, and that their judgment be paid by privilege and preference out of the proceeds of the sale.

I do not controvert the facts stated in the opinion.

It does seem impossible, legally, in one proceeding, to sustain intervenors and third opponents' contradictory positions not alternatively pleaded.

They seek to have the mortgage declared simulated, fraudulent, void, under which the property was sold, or to have been extinguished; at the same time they pray to be paid out of the proceeds of the sale.

In other words, under part of the averments, there was no sale possible.

Under the remainder of the averments there was a sale, and they pray to be paid from the proceeds.

The authorities are that a third person in good faith acquires title although the sale be made under an invalid or extinguished mortgage.

Granted, this does not have the effect of lessening the force and effect of judicial allegations.

The intervenors and third opponents are bound by their allegations without regard as to whether there is a title or no.

As to them, in this suit, they are in the attitude of alleging that there was no mortgage and in consequence no sale.

And immediately after that there was a sale, and that they were entitled to the proceeds.

Whatever may be the effect of these allegations and what scope they should be given ultimately, I express no opinion.

Their effct and scope, I will state, however, with great respect, should be considered in other proceedings averring consistent causes of action.

ON APPLICATION FOR REHEARING.

WATKINS, J. An examination of this case has only served to confirm us in the conclusions at which we first arrived—the issues examined and the questions decided being equally applicable to the original and supplemental petitions of intervention; no alteration in

the phraseology of the *decree* is necessary, except to make it applicable to the original as well as the supplemental petitions.

It is therefore ordered, adjudged and decreed that our original decree be so amended as to order the case remanded to the lower court, to be there proceeded with according to law and the views in our opinion expressed on both the original and supplemental petitions.

Rehearing refused.

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No. 11,373.

STATE OF LOUISIANA VS. KID NASH AND KID BARNETT.

The defendant has no right to a postponement of his case to await the result of the trial of another case.

There was nothing to show that there was any feeling, opinion or prejudice as would prevent a fair trial in selecting the tales jurors in the manner they were selected.

Reason and authority sustain the right of the court to discharge a jury in cases of physical or moral necessity.

After a juror has been accepted, if it be discovered that he is incompetent to serve he may, in the exercise of a sound discretion, be set aside by the court at any time before evidence goes to the jury.

Jeopardy can not begin before the case is opened before the jury and the indictment is read. At what time thereafter it begins, it is not essential to decide in this case.

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1. In this State the right of the accused in a criminal case to introduce testimony as to threats on the part of the deceased, and as to his character as a violent, quarrelsome man, is not absolute. Such testimony is only exceptionally admissible, and the condition precedent upon which it is admissible is that the district judge should have found that under the evidence in the case as a whole the question of the commission by the deceased of an overt act had been proved and had become legally a relevant fact. In dealing with that question this court has repeatedly recognized the right of the District Court to pass upon the credibility of the witnesses.
2. If the bill of exceptions taken to the refusal of a district judge to admit such evidence shows that even if certain testimony which he had declined to have reduced to writing at the request of the accused had been embodied in full in the bill it would be insufficient to break the force of the recitals of the judge as to the other testimony in the case on which he rested his conclusions for excluding the evidence, the refusal to have such particular testimony reduced to writing would not be reversible error, the correctness of the judge's statements as to this other testimony not being controverted.

APPEAL from the First District Court, Parish of Caddo. *Taylor, J.*

John R. Land, District Attorney, and *Wise & Herndon* for the State, Appellee:

1. The two defendants, jointly indicted for murder, obtained a severance in their trials. It was in the power of the prosecuting attorney to determine in what order he would try them. Bish. on Cr. Pr., Sec. 1018.
2. It was not error in the trial judge to refuse to instruct the sheriff to summon tales jurors from a designated portion of the parish. Act No. 14 of Acts 1873; 14 An. 461; 23 An. 148; 26 An. 46; 32 An. 1003; 34 An. 1084; 35 An. 803.
3. The court may discharge an obnoxious or unfit juror, even after the jury has been empaneled and sworn, if no evidence has been introduced. Thompson & Merriam on Juries, Sec. 273; 34 An. 919, and cases cited; 29 An. 642; 39 An. 868.
   A large judicial discretion is given the trial judge in passing on the qualifications of jurors, and his ruling in such a matter will not be set aside by the appellate court unless the error is manifest. 34 An. 991, 1195; 38 An. 480; Thompson & Merriam, Sec. 252; 98 U. S. 145.
   Persons who entertain conscientious scruples against capital punishment are incompetent jurors. 11 An. 585, 685; 30 An. 367; 34 An. 919.
4. When a juror is discharged before any evidence is heard the remaining jurors need not be re-sworn, and the defendant was not entitled to his peremptory challenges over again. 39 An. 868.
5. Jeopardy does not attach whenever a case can not be proceeded with by reason of some physical or moral necessity arising from no fault or neglect of the State. In such case the trial may be stopped and the defendant will not be protected from being afterward tried upon the same indictment. Vol. 39 American Reports, p. 424, and cases cited; United States vs. Perez, 9 Wheaton, 579; 8 R. 506; Wharton's Cr. Pl., Sec. 447; 1 Bish. Cr. Pr., Sec. 809; 3 An. 715; 5 An. 398; 39 An. 470; 35 An. 483; 33 An. 1410; 35 An. 341; 11 An. 284.
   Jeopardy is waived by defendant asking for a new trial. 1 Bish. Cr. Law, Secs. 995, 1001, 1003.
   Defendant can not protect himself from the effect of this waiver resulting from asking a new trial by asking for an appeal from the ruling of the court on that point.
   In criminal cases appeals lie only from verdict, judgment and sentence. 15 An. 347; 22 An. 460; 30 An. 306; 37 An. 62; 32 An. 527.
6. The accused is not entitled to have the testimony of witnesses reduced to writing involving only questions of fact and relating to the merits of the case. He is entitled to have the testimony reduced to writing for the purpose of annexing it to a bill of exception for review by the appellate court, to obtain a ruling upon questions of law on which he relies for relief, not on questions of fact. 41 An. 143.

M. C. Elstner and *Hicks & Hicks* for Defendant and Appellant:

1. The rule is, that one accused of a capital crime before a competent court is in jeopardy the instant that the petit jury is selected, empaneled and sworn to try, and true deliverance make; unless by some overruling necessity the jury are discharged without a verdict; or other matter exists that the defendant can make grounds for a new trial if the verdict be against him.
   And a juror is competent to try a capital case who is opposed to capital punishment; and even if he committed a fraud upon the State, it did not authorize his removal.

2. After an unqualified verdict of guilty in a capital case, jeopardy is not waived by a motion for rehearing, and a motion for an appeal, both of which applications were denied.
3. After the selecting, empaneling and swearing a jury in a capital case, one of the jurors was removed without the consent of the defendant, and against the protest of his counsel, and the court ordered the case to proceed to the selection of another juror to fill the place of the juror removed, who with the remaining eleven jurors is to compose the panel, the defendant is entitled to his peremptory challenges as to the eleven as well as to others offered him, although he had exhausted his challenges in making the first jury.
4. The defendant is entitled, as of right, to have reduced to writing and made part of the record, for the purposes of review in the appellate court, all the evidence upon which the trial judge bases his opinion as to the admissibility or inadmissibility of evidence offered during the progress of the trial. State vs. Nelson, 32 An. 842; State vs. Seiley, 41 An. 143; State vs. Nash et al., 45 An. 1157.

The opinion of the court was delivered by

BREAUX, J. The defendants were jointly indicted, tried and convicted of murder.

The sentence was annulled at the last term of court at Opelousas and the case remanded for a new trial. 45 An. 1137. A severance having been granted on the district attorney's election the defendant Nash was placed on trial.

His counsel, who also represented the co-defendant, Barnett, moved that the case against him be tried, and stated that they were not ready to try Nash.

To the court's refusal to interfere and to grant the application for postponement the defendant Nash excepted, and urged that he could not safely go to trial without the testimony of his co-defendant, whose testimony would be to him more material and important after the trial, whether acquitted or convicted, than when the charge was pending against him.

The *venire* for the term having been exhausted, the defendant applied for the summoning of talesmen outside of the limits of Shreveport and of the Fourth Ward, in which he urged there is a deep seated prejudice, that would render it impossible for him to secure an impartial jury.

The jury had been empaneled to try the case and placed in the sherff's custody, and remained from the evening on which they had been so empaneled until the day following, when the district attorney in a written application moved for the discharge of one of the jurors on the ground that on his

voir dire, in answer to questions propounded to him by the counsel representing the State, he had testified and said, among other things, that he had no conscientious scruples against finding a verdict that would entail capital punishment; that in truth he was opposed to capital punishment, and so announced to several persons shortly before he was called into the jury box, which fact was unknown to the State, and that by false statements he was accepted and sworn.

The court, after hearing evidence, granted the application and discharged the juror.

The defendant filed an application for his discharge on the ground of former jeopardy.

The court refused to grant the application and to discharge the defendant.

After the court had discharged the juror, C. A. Hays, and had refused to discharge the defendant and had ruled that the district attorney could have another juror selected, the defendant claimed the right of peremptory challenge, which was refused by the court.

The court held that the defendant had exhausted his peremptory challenges and that the number of challenges could not be increased under any circumstances.

Upon the trial application was made by counsel for the defendant to have reduced to writing and made part of the record all the evidence bearing upon the question of overt act, or hostile demonstration at the time or preceding the homicide, for the purpose of laying the foundation enabling him to prove threats, communicated and uncommunicated, against his life, and to prove the character of the deceased as a dangerous, quarrelsome and vindictive man.

The defendant alleged error to his great injury and prejudice and the violation of his legal and constitutional right on the part of the court in not having maintained his plea of "former jeopardy" and offered to file an application for rehearing on his motion to discharge on the ground of former jeopardy, which the court refused to receive.

An appeal was applied for from the court's action in refusing to discharge the accused.

He was found guilty as charged. A new trial and a motion in ar-

rest of judgment were overruled. From the verdict, sentence and judgment, the defendant prosecutes this appeal.

ORDER OF THE TRIAL.

The records do not disclose that the case was called out of the order of fixing, irregularly to the prejudice of the defendant. The district attorney's action was within the court's direction and control and involves the performance of a duty with which it is not improper to entrust him.

There was no reason suggested to depart from the general rule conferring upon him the right to determine the order in which criminal cases shall be tried. Relative to the postponement, the application involved a postponement to await the result of a trial of a co-defendant, after a severance has been granted. Such a postponement in order that an accused may be called as a witness, is not a legal right. If there be any advantage, it is not one which can control the State in the trial of cases.

A motion for postponement to await the result of a trial was refused in the case of State vs. Ford, 37 An. 456.

REFUSAL OF COURT TO ORDER TALES JURORS FROM COUNTRY WARDS.

The court, in declining to issue the order applied for and to designate localities or wards from which to select talesmen, is sustained by the law upon the subject.

In the reasons for the ruling, it is stated that there was nothing to show that any feeling, opinion or prejudice existed as would prevent a fair trial if the tales jurors were selected in the manner pointed out by law.

FORMER JEOPARDY.

The defendant, through his counsel, urges that he was in legal custody when the juror Hayes was discharged, as made apparent by the records, and that he may now claim to be dismissed from the cause and be no more prosecuted for the same offence.

We shall, in the first place, consider the decisions of this State on the subject.

In State vs. Paterno, 43 An. 514, the question was not similar to that under consideration.

The *nolle prosequi* upon which the accused based his plea of former jeopardy was entered during the empaneling of the jury. The

utterances of the court were not particularly directed to a question similar to that now presented and did not seek to determine when jeopardy begins.

In State vs. Costello, 11 An. 283, the court says that reason and authority sustain the right of the court to discharge a jury in cases of evident physical or moral necessity.

The court approvingly quotes from Justice Kent:

"Either the court must determine when it is requisite to discharge, or the rule must be inflexible, that after the jury are sworn and charged, no other jury can in any event be sworn and charged in the same. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity and to determine what combination of circumstances will create one." And refers also to Justice Story, who lays down a similar doctrine.

The jurisprudence of our State, says the court, is in conformity with these views.

In State vs. Deskin, 34 An. 919, after three jurors had been sworn and accepted, the trial judge, over the objection of the prisoner, propounded to each of the sworn jurors the usual questions on that subject, and two of them answering that they had scruples, they were excluded for cause.

The court's action was sustained on appeal. The decision is guarded and manifests a desire not to extend the principle too far, in the direction of the court's discretion to judge of the necessity of discharging a juror after he has been sworn and accepted.

The court says in that case:

"We think it would be a mockery of common sense to hold that the court would be bound to close its ears to the information and to permit the trial to proceed before an incompetent jury, who could not find an unqualified verdict in favor of the State under any circumstances, however clearly the law and the facts might sustain and require it."

In State vs. Moncla, 39 An. 868, after the twelve jurors had been selected and empaneled, one of the number announced that he was sick. The judge ordered the discharge of the juror and directed the sheriff to call another juror in his place. Defendant's twelve challenges having been exhausted, defendant objected to the discharge of the juror.

The court decided that it was competent for the trial judge to add another juryman. The court in that case says:

"It is difficult to conceive of any reason why a different rule should prevail if a sworn juror should be taken sick when the eleventh juror is sworn, than if his sickness should happen after the twelfth juror had been sworn, and before any other proceedings had been taken.

"We should be loth to recognize so flimsy a distinction."

In Thompson and Merriam, Sec. 273, the doctrine is announced that the court is not bound to suffer the case to proceed after the jury have been empaneled, when informed of the fact going to the disqualification of a juror from which it is probable that the verdict may be set aside.

That the obnoxious juror may be excluded, and that too although he has been sworn, if no evidence has been introduced. The prisoner can avail himself of the plea of once in jeopardy, only under such circumstances as would enable him to sustain the plea of *autre fois acquit* or convict. State vs. Blackman, 35 An. 484. State vs. Ritchie, 8 An. 715.

Mr. Wharton announces that "in Illinois it was held correct, in a capital case, to strike off a juryman after the jury were sworn on the ground that he was an alien.

"The same course has been taken in Pennsylvania in a case where the court, after the jury had been sworn, struck off a juryman on the ground that he was incompetent from irreligion or prejudice.

"It is not contended that this power is given to the court to be exercised arbitrarily or without good cause to believe that interference is necessary to prevent great injustice to one side or the other.

"It is to be used alike for the protection of the public and for the security of the prisoner in his right to an impartial trial; alike when the juror is so biased either against the prisoner or against the government that he is disqualified to serve on the panel." See also Commonwealth vs. McCormick, 39 American Rep. 423.

Jeopardy can not begin before the case is opened before the jury; nor before the indictment is read or the examination into the case begins. At what point thereafter it begins it is not necessary to decide in this case. Mr. Wharton says that however discordant the cases may be as to what necessity justifies a discharge, they unite in the position that until the jury are "charged" with the

offence on an issue duly framed, that is to say, until the jury is sworn, and the case committed to them, the jeopardy does not begin. Until this period the defendant is not technically in jeopardy. Even a juror who is found to be incompetent after swearing, but before opening the case, may be set aside without vitiating the procedure.

The accused had not been placed in jeopardy and has no right to his discharge on that ground.

The court, in State vs. Castello, 11 An. 283, emphatically announces that an accused is not put in jeopardy upon the mere empaneling of a jury, before a word of testimony has been heard against him and before the jury has received any information concerning the charge against him by reading the indictment.

REFUSAL TO PERMIT FILING OF APPLICATION FOR REHEARING.

The filing of an application for a rehearing on the overruled motion for his discharge on the ground of former jeopardy was refused.

On appeal it is manifest that the defendant's application could not be entertained.

Errors may be recalled and corrected at any time when apparent.

The defendant can not, as a right, have points arising during the trial reconsidered that have been fully argued by counsel and have received ample consideration from the court.

He has ample opportunity at subsequent stages of the case to be heard anew.

Appeal.—The defendant also moved for an appeal, averring that he had a right to his acquittal after the juror Hayes had been removed from the panel.

And that this right having been refused, from the order of refusal he desired an appeal, for which he applied.

The issues of a case can not thus be divided.

They are now, in proper time, before the courts after trial.

Any appeal prior to that taken would have been premature.

REMOVAL OF THE JUROR FROM THE PANEL.

In the bill of exceptions counsel in behalf of the defendant state that upon the application of the district attorney, against their objection upon hearing evidence as to the juror's competency, which

was reduced to writing and made part of their bill, U. A. Hayes, one of the jurors who had been sworn, was removed from the panel, and the district attorney proceeded in the selection of another juror.

The court's statement, made part of the bill, is that there was satisfactory reason for the removal; that the answers to questions put on the *voir dire* and evidence taken on the motion to discharge in respect to the subject of capital punishment was so equivocal and uncertain as to render him an unfit juror. In another bill referring to the same testimony he says that his statements were inconsistent and untrue.

The testimony taken on the motion to exclude the juror shows that he swore on his *voir dire* to his not being conscientiously opposed to capital punishment.

Prior to his examination on his *voir dire*, but after he had been summoned as a tales juror, he said to several witnesses that he would not be accepted as a juror by the State for he was opposed to capital punishment.

When examined as a witness on the motion to exclude him as a juror, his answers did not satisfy the trial judge that he was not conscientiously opposed to capital punishment.

The question arises in this case, can a juror be challenged on moral grounds after he is sworn and just prior to opening the case before the jury by reading the indictment?

In reference to the moral character of a juror this court decided that the trial judge is authorized to exclude a juror from the panel if satisfied of his unfitness morally to serve. State vs. Lartigue, 29 An. 642.

The same principle is laid down in State vs. Barnes, 34 An. 396; People vs. Damon, 13 Wendell, —— 357.

Jeopardy not having attached, it was not too late in the stages of the case to exclude the juror.

The court was satisfied that the juror was not legally fit to discharge the duties incumbent upon him in a case in which the accused is charged with murder, and, therefore, exercised a sound discretion, after having heard testimony, in discharging this juror. If the authority could be exercised after the third juror of the panel had been sworn, as in the Disken case (34 An.), it could be exercised after the twelfth juror had been sworn, prior to the examination of witnesses.

If legal in so far as relates to the third or fourth juror, it follows that it is legal as relates to the juror last sworn, and at all times prior to jeopardy.

The purpose of the law and of the State is a fair trial, unaffected by bias or prejudice.

It must be made manifest that the juror has no conscientious scruples against capital punishment; that he entertains no opinion affecting his competency.

To be sure, says the court, in the case of the United States vs. Joseph Perez, 9 Wheaton, 579, the authority of excluding a juror should be used with the greatest caution, under urgent circumstances and for very plain and obvious causes.

The necessity for removal may be moral as well as physical. 11 An. 283.

In such a case the disqualifications having been discovered subsequent to the oath, before the opening of the case before the jury, the motion to remove the juror was properly allowed.

Mr. Wharton states that it has been ruled, after a juror has been sworn in chief and taken his seat, if it be discovered that he is incompetent to serve he may, in the exercise of a sound discretion, be set aside by the court at any time before evidence. And this may be done even in a capital case as well for cause existing before as after the juror was sworn.

The obnoxious juror may be removed, although he has been sworn, if no evidence has been introduced. Thompson and Merriam, Sec. 273.

REFUSALS OF PEREMPTORY CHALLENGES.

The question comes up as to the right to peremptory challenges, and as to whether the trial judge was bound to restore challenges to the accused.

The issue presented upon this point is of great moment.

Its decision has occasioned us the greatest concern.

Had the juror testified on his *voir dire* so as to disclose all the facts and circumstances that were made known afterward, he would not have been accepted as a juror.

The court *a qua* became satisfied from testimony subsequently heard that he was incompetent.

Was the defendant deprived of any of his legal rights in this matter of challenges?

His challenges were exhausted prior to the examination of the twelfth juror on his *voir dire;* had the juror made the statement which was subsequently disclosed he would have been discharged, and the accused would have been without a peremptory challenge to oppose to any juror subsequently called, as he was when another juror was called to serve in his place.

To this stage of the case the jurors had been regularly sworn and accepted.

To swear them a second time so as to allow twelve more challenges would have increased the number of challenges to more than twelve in empaneling the jury.

The language of the court in Stone vs. The People, 2d Scammon, p. 330 (Illinois), is clear and emphatic.

The juror was withdrawn for incompetency, being an alien.

The trial had commenced and witnesses for the prosecution had been sworn. The remaining eleven jurors were all competent, says the court, in that case and had all been chosen and accepted as well by the prisoner as the prosecutor—that it would have been irregular to have discharged them without his consent. It would have deprived the prisoner of a right secured to him, and which had been consummated under the law. That the court by withdrawing the incompetent juror corrected the error to the extent occurring and could go no further; that the case is *sui generis*, and should be decided on principles of analogy.

"Why is a court, for the ends of justice, and where manifest error exists for the act, authorized to discharge a jury? And if a whole jury may, in such a case, be discharged, why not set aside a person improperly selected and sworn?

"That no injustice has been done; no law has been violated. That the rights of the prisoner have not been infringed; the course is agreeable to justice and we can perceive no wrong in the mode adopted."

In this case the accused was indicted for murder and the judgment affirmed.

In the case of State of Nevada vs. Pritchard, 16 Nevada, p. 102, this case is approvingly referred to, and the court held that an incompetent juror, after the jury is sworn, may be discharged with-

out a necessity for the discharge of the eleven remaining competent jurors.

In a Tennessee case, that of Taylor vs. The State (Lea, Vol. II, p. 718), the court held that no serious argument had been submitted against the propriety of the discharge, but that the point was made that the court should have at the same time discharged all the jurors, because of the fact that the incompetent juror had associated with the residue of the panel for two days. That the court might have discharged the entire jury, if, in the exercise of his discretion, he had thought the ends of justice required such action. That the question was whether the trial court was compelled by law to discharge the jury merely because one of the jury had previously formed and expressed an opinion adverse to the defendant? That the defendant did not object to the other jurors because of their association with the incompetent juror, nor ask for their discharge, nor offer to show that anything improper had passed between them and the discharged juror.

"That upon principle, in the absence of anything else, the mere association of selected jurors with one of their number who had formed and expressed an opinion as to the guilt of the defendant would no more render them incompetent than such association previous to the trial; that no decision has been cited holding otherwise."

See also Ray vs. State, 4 Texas, 454.

The twelfth juror in that case (4 Texas) was excluded some time after the opening of the case and hearing of testimony by the jury.

The case is cited as an additional decision in support of the ruling excluding the juror before evidence had been heard, and not at all with reference to ousting a juror after the indictment has been read to the jury and evidence heard.

Courts have gone to the extent of holding that—

"Where a case has been tried by an impartial jury, although the judge, on the application of one of the parties and against the consent of the other, may have rejected a juror for cause of questionable sufficiency, such rejection does not afford a ground of complaint if justice has been done in the premises. In other words, while disallowance of a cause of challenge will work a reversal of the judgment, an improper allowance of a cause of challenge will not necessarily have this effect. A qualified juror may be rejected, and still a jury of lawful men, against whom there is no objection, may be

obtained. A party is entitled to a lawful jury, but he is not under all circumstances, as a matter of right, entitled to have the first juror called who has all the statutory qualifications." Thompson and Merriam, p. 298.

We do not base our conclusion on this principle of practice, for in the case at bar the court's ruling appears supported by a preponderance of evidence establishing cause for removal of the juror.

If there was no good ground of complaint when the cause of removal was of "questionable sufficiency," there is surely none when the trial judge states as part of one of the bills on the subject: "The court in its reasons said that the discharge was based on sufficient reasons, as would appear of record. In addition, I have to say this record shows incontestably that this juror had said out of court that he was opposed to capital punishment, and in court has sworn just the reverse. It does not matter whether this opposition was conscientious or otherwise, or that he, on examination, attempted to explain it on metaphysical or other grounds—it suffices to say that he swore falsely, for both statements can not be true."

This court in two cases—State vs. Moncla, State vs. Disken—affirmed the rulings allowing a juror to be withdrawn after he has been sworn.

In the former the peremptory challenges had been exhausted and the jury sworn, when another juror was called to serve in the place of the juror withdrawn. In the case at bar the juror was excluded for cause at a later stage in empaneling the jury, and before jeopardy attached. As precedents these cases have a bearing upon the issues presented.

Refusal to Reduce Evidence to Writing.

The next ground of objection is to the ruling in refusing to have reduced to writing the evidence relating to an alleged overt act.

The defendant asked that the testimony of a number of witnesses, including his own, be reduced to writing in order that it might be made part of the record for the purpose of showing who began the attack in the difficulty, and to lay the foundation for the introduction of threats, communicated and uncommunicated, and to introduce evidence of the character of the deceased as that of a dangerous, quarrelsome and vindictive man.

The following is the court's statement in the bill of exceptions:

"So far as concerns the testimony of the witnesses offered to show whether accused or deceased began the attack, it is sufficient to say that these witnesses actually testified before the jury on this point, but the court did refuse to permit their evidence to be reduced to writing and refused to receive evidence of communicated threats or bad character until some overt act was proved, which was not done."

This court has repeatedly exercised the constitutional authority of reviewing the finding or ruling of district judges on questions of blended law and facts.

This authority is limited so as not to embrace within its scope the review and determination of facts touching the merits of the prosecution.

The record discloses a positive solemn statement of the district judge that no overt act was proven.

That is his reason for the refusal to reduce the evidence to writing.

NEW TRIAL.

At the risk of repetition we will give consideration again to an important point, already decided, which is presented in this motion.

The other grounds of the motion also were previously presented and decided.

It relates to the alleged "overt act" on the part of the deceased at the time of the killing and the refusal of the trial judge to reduce the testimony to writing and made part of the record for the purpose of enabling the Supreme Court, in the event of a conviction, to pass upon the question as to whether there had been proof of an "overt act" upon the part of the deceased at the time of the killing, and before the defendant made any assault upon the deceased, and for the purpose of authorizing the defendant to introduce evidence of threats to kill defendant, and of other personal violence made by the deceased just prior to the killing and which were communicated, it is alleged, to the defendant, and of other threats not communicated to the defendant, all for the purpose of laying the foundation to the admission of testimony.

The district judge, passing upon the point presented anew in the motion for a new trial, says:

"If the evidence was offered to show that deceased began the attack, or did some overt act to carry out his threats, the evidence failed to prove to the satisfaction of the court that deceased com-

menced the attack or did any overt act or made any demonstration of an attack.

"There was some evidence tending to show a hostile demonstration on the part of the deceased, yet it appeared to the court from all the facts and circumstances, and specially from the testimony of three persons * * * who were eye-witnesses of the affray and saw it from its inception to its close, that no hostile demonstration by deceased had been proved."

IN ARREST OF JUDGMENT.

The grounds of this motion have been considered and decided.

They presented no undecided points.

The verdict was rendered and the sentence pronounced after a legal trial.

It is therefore ordered, adjudged and decreed that the verdict, sentence and judgment are affirmed.

ON APPLICATION FOR REHEARING.

NICHOLLS, C. J. Upon an application by the defendant for a rehearing, ably presented and forcibly argued, we carefully reconsidered the grounds upon which we rested our opinion. This re-examination confirmed us in the correctness of our views, save upon one subject, as to which we requested and have heard oral argument. The questions reargued are contained in and covered by several bills of exception.

After the jury had been empaneled and sworn and the indictment had been read, the defendant's counsel asked the court that "all the evidence material to the following points be reduced to writing and made part of the record, to-wit: For the purpose of showing an overt act upon the part of the deceased at the time of the killing and before any assault was made by the defendant. For the purpose of laying the foundation for the introduction of evidence of communicated threats. For the introduction of uncommunicated threats. For the purpose of introducing evidence of the general character of the deceased as a dangerous, violent and quarrelsome man. For the purpose of applying the evidence so taken to special charges to be asked for by the defendant when the court should come to charge the jury. And upon all collateral questions that might arise during the progress of the trial affecting the admis-

sibility of evidence, and upon all rulings by the court founded on evidence."

The district judge refused the request on the ground "that in criminal trials all the proceedings, except the indictment and charge to the jury, are conducted orally, and the accused has no right to require the testimony to be taken down in writing. State vs. Duncan, 8 Rob. 562, and I (the district judge) am not referred to any law which compels the court to depart from this mode of procedure, even for the special purposes mentioned."

To this refusal the defendant duly excepted.

The case quoted by the district judge (State vs. Duncan) is one in which an attempt was made to have the testimony which went to the jury reduced to writing. The statement made by the judge, that in a criminal case testimony can not be taken in writing for any of the special purposes mentioned, was too broad, but his action in overruling the motion in the form in which and at the time it was made was correct. Defendant had no right to make the request in advance of the offer of the witnesses by whom he expected to establish the facts upon which he was relying, and especially did he not have the right to virtually impose upon the judge the duty of selecting from the whole mass of the testimony those parts which he desired to preserve in writing.

At a later stage of the case, after the State had closed and before the defendant had begun the introduction of evidence in his defence, he asked that the testimony of several witnesses, including himself (naming them), should be reduced to writing in order that it might be made part of the record in the case for the purpose of showing who began the attack in the difficulty on the occasion in which the deceased was killed, and for the purpose of laying the foundation for the introduction of threats, communicated and uncommunicated, and for the purpose of introducing evidence of the character of the deceased as that of a dangerous, quarrelsome and vindictive man. This application was refused, the judge stating "the reasons for not reducing the testimony to writing, and for rejecting evidence to prove communicated threats and the desperate and dangerous character of the deceased, without proof of some overt act or hostile demonstration on his part, have already been given in other bills, and are referred to as reasons for the ruling in the instant one. So far as concerns the testimony of the witnesses

offered to show whether accused or deceased began the attack, it is sufficient to say that these witnesses actually testified before the jury on this point, but the court did refuse to permit their evidence to be reduced to writing, and refused to receive evidence of communicated threats or bad character until some overt act was proved, which was not done."

In one of the bills of exceptions to which the judge refers for his reasons, he said, in excluding testimony offered to prove uncommunicated threats: "The evidence failed to prove to the satisfaction of the court that deceased commenced the attack, or did any overt act or made any demonstration of an attack. There was some evidence tending to show a hostile demonstration on the part of the deceased, yet it appeared to the court from all the facts and circumstances, and specially from the testimony of three persons (naming them) who were eye-witnesses of the affray, and saw it from its inception to its close, that no hostile demonstration had been proved. Whether it had or not been proved was a question to be decided by the court alone, which is necessarily vested with the discretion to disregard testimony it deems unworthy of belief. State vs. Ford, 37 An. 443; State vs. Janvier, 37 An. 644; State vs. Jackson, 37 An. 896; Schwartz vs. Crescent City R. R. Co., 30 An. 20."

In another bill refusing to allow testimony of communicated threats the judge said: "It is true that some evidence was offered to show an overt act and hostile demonstration on the part of deceased, but this testimony for reasons to be stated hereafter was disregarded by the court as unworthy of belief." Repeating the declaration made before by him that whether a foundation had been laid for receiving the rejected testimony was a question to be determined solely by the court, which is necessarily vested with discretion to disregard testimony it deemed not worthy of belief, the judge proceeded to recite and analyze the testimony given in the case from which he drew his conclusions on which his rulings were based.

In his motion for a new trial, defendant, among other reasons upon which he grounded the same, relied upon the rulings of the judge in the matter just referred to, and the bills of exceptions taken thereto. The new trial was refused. In his reasons for refusing, the district judge in alluding to the decisions of this court in State vs. Nelson, 32 An. 842; State vs. Seiley, 41 An. 143, and that in this case on the first appeal, said: "The rulings in those cases were

made upon questions purely collateral to the main issue, upon the decision of which they had no bearing whatever. It did not require the court to go into an examination of any evidence touching the merits of the prosecution. It was not called upon to have or express an opinion touching the weight of the dying declarations, and whatever might be the conclusion as to the competency *vel non* of a juror that conclusion could not affect the result of the trial. Hence the reduction of the testimony on these collateral points to writing, although it was clearly an innovation upon the ancient practice of the courts and avowedly excused on the ground of convenience, could produce no greater harm than to prolong and increase the costs of the trial. But where it is proposed to extend this rule so as to embrace evidence going directly to the merits, to proceedings arising in the course of the trial before the jury, and to review the findings of the judge on questions of fact, the determination of which is necessarily confided to his discretion as a basis for his rulings on the admissibility of testimony, we may well call a halt. This case illustrates the necessity of calling a halt. Defendant claims the right to have all the evidence reduced to writing which bears upon the fact of an overt act."

"The fact *vel non* of an overt act is a point of vital importance to the result of the prosecution. It is visceral in its nature, for upon it depends the guilt or innocence of the accused. He pleads self-defence, which admits the killing, but excuses it on the ground that it was done to protect life. To maintain this plea he must show an actual assault at the time of the killing (State vs. King, 22 An. 454), made under such circumstances as denoted a present intention to take life or do great bodily harm (State vs. Swift, 14 An. 827). An actual assault with a deadly weapon, with apparent intent to kill, made at the time of the homicide, is the overt act known to the law, and proof of such act is essential to self-defence (Ford Case, 37 An. 444)."

"Any inquiry into the existence of this act necessarily involves an inquiry into the merits of the prosecution, and if the right to have the testimony on this point reduced to writing be conceded, it must be conceded on every other disputed point. Again, if defendant has the right to have this evidence in writing before the appellate court, the latter must have the correlative right to pass upon the evidence and judicially decide upon its sufficiency to establish

the fact essential to conviction or acquittal. It would in that event have the right to decide that an overt act had been proved, and if it did so decide, it would unquestionably say to the jury, "Your verdict is wrong; it is contrary to the law and the evidence, and for that reason we will set it aside, and inasmuch as defendant has established his plea of self-defence at this trial, the jury on the next trial is instructed to acquit should the same evidence be then produced."

If the defendant has any cause of complaint in this case, it is that under its facts he was entitled to introduce testimony to prove communicated and uncommunicated threats and the dangerous character of the deceased, that he has been unjustifiably deprived of that right, and as the effect thereof he has been legally injured. The objections urged by him to the action of the court in refusing to permit the reduction of certain testimony to writing are merely incidental to and in aid and support of the real grievance which is set up. If in this State evidence as to communicated and uncommunicated threats and as to violent character became *ipso facto* admissible by the fact that one or more witnesses testified directly as to the existence of an overt act on the part of the deceased, this case would present no difficulty whatsoever independently of any question of the reduction of the testimony to writing, for it is conceded by the district judge that there was such testimony, but the practice in Louisiana has not been to permit evidence upon those points to be introduced and go to the jury simply because one or more witnesses may have given testimony to the effect that the deceased had committed an overt act. The practice has been for the district judge to determine whether or not there was in the evidence in the case as a whole, evidence which would tend and go to establish *legally* the overt act, and upon his conclusions on that point has been made to depend and rest the admissibility of the testimony.

In dealing with that question the right of the judge to consider the credibility of the different witnesses has been repeatedly recognized by this court. It may be that this practice lodges a power too great in the judge and works wrong to accused parties, as there is great difficulty in reaching and reviewing the action of the district judge. It may be as *res nova* that it would have been better to have held that the moment one or more witnesses testify to an overt act that testimony of threats and character should *ipso facto* be admis-

sible and should go to the jury, to be weighed and determined by it with other circumstances of the case, but certainly since the Ford case that has not been the practice. The right to have this particular kind of testimony admitted is not in this State considered absolute. It is only exceptionally admissible, and the condition precedent upon which it is admissible is that the judge should have ruled that under the evidence as a whole the question of the overt act had become a *relevant* fact in the case. Defendant's counsel was well aware of the legal position on this point, and hence came his efforts to place matters in a shape such as to enable us to reach and review the conclusions of the district judge.

Has he accomplished his purpose?

The first and proper place for us to seek for information as to whether defendant has been aggrieved by the exclusion of testimony as to threats and character is in the bill of exceptions reserved upon the ruling of the judge on that particular question.

An examination of that bill shows that the judge admits and declares that Barnett and one Gardner had testified that immediately upon the entrance of Nash (the defendant herein) into a station where the deceased was standing, the latter at once fired a pistol at him, and Nash's fire was a return fire. He, however, declares that Gardner is a relative of the defendant, and Barnett is now under indictment, charged jointly with the defendant with the murder of the deceased McCort, and he declares them, in his opinion, unworthy of belief. He further states that their testimony was positively contradicted by three reputable witnesses who saw the whole affair from beginning to end. The judge, as we have before said, gives a statement of different facts, sworn to on the trial, and applying the testimony of Barnett and Gardner to these facts, and then the testimony of the other three witnesses to these facts, declares that, in his opinion, there was no such evidence of an overt act as would justify the introduction of testimony as to threats or character. Taking as true the statements made by the judge *as to the evidence*, we discover no *error of law* in his ruling. But, says the defendant, we ought not to take this statement as to the evidence as conclusive; that in point of fact it is erroneous, and had he been permitted to do what he unsuccessfully attempted to do in the lower court—taken down the testimony of Barnett and Gardner in writing—that testimony, when brought up, and if brought up, would have established affirmatively

the incorrectness of the statements; that we must assume so for the purposes of this case.

We do not see that "*writing*" could or would more directly and positively disclose what those witnesses swore to than the admissions of the judge. Those witnesses, beyond question, swore that the attack was begun by the deceased's shooting at McCort. There is no difference of opinion between the district judge and the counsel on that point. The divergence between them commences as to the effect of that testimony. Counsel for defence has overlooked the fact that whilst he offered to take down in writing what his own two special witnesses might swear to, he did not, at the same time, attempt to have taken down that of the three witnesses whom the judge refers to, and upon whose testimony he mainly formed his opinion. It is not claimed that the recital by the judge of what those three witnesses swore to was not absolutely correct, nor that the various other facts to which the judge alludes were not positively established. We must assume that, so far, at least, as the testimony *going to disprove the overt act was concerned*, the judge's statements are true, and in reaching any conclusion as to his rulings we could not ignore his statements. We certainly could not exclusively consider what *defendant's witnesses, one or more*, may have sworn to and *disregard what the State's witnesses swore to*, for we would take a one-sided view of the situation by such a course.

If we assume in this case that the judge had *permitted* the evidence of Barnett and Gardner to have been taken in writing, and he had for the purposes of defendant's exception embodied that testimony in full in the bill, *leaving the remainder of the bill just as it is*, in what way would defendant's cause be advanced? We would still have before us the judge's statements as to the evidence on the other side of the question, as to the correctness of which there would be no issue, and we would be forced on the whole question to adjudge the judge's course not to be error. Had defendant controverted the statement of the judge as to what the three witnesses whose testimony was unfavorable to defendant had said, and had he endeavored unsuccessfully to have had that testimony taken down, his position would have been much stronger than it is. That testimony for obvious reasons was not sought to be perpetuated. Assuming that the judge should have permitted the reduction of Bar-

nett's and Gardner's testimony to writing and that he erred in declining to do so we would still have a case of error without injury, for on the showing made in the bill of exception we would have to maintain the exclusion of the testimony as to threats and character.

In the case at bar all the evidence on the subject of the overt act went before the jury—and as in spite of the testimony of Barnett and Gardner the jury returned an unqualified verdict of murder, it is evident that it must have placed on their testimony the same estimate that the judge did. This fact is not of course conclusive, but it goes far to sustain the opinion of the judge as to the credibility of those witnesses. Testimony as to threats and character are not introduced here to go to establish the overt act, but the overt act having been proved this testimony is permitted to be introduced to supplement the other evidence in the case.

For the reasons herein assigned our former judgment must remain as it was and the rehearing asked for is refused.

No. 11,340.

46 215
46 1488

GEORGE FONT ET ALS. VS. JAMES MCCONNELL, JR.

46 215
52 391
52 1160

1. Defendant in possession claiming title has the right to require that plaintiff not only show a better title than his own, but a title as good as any the latter can oppose to him, whether vested in defendant or not. This outstanding title must be a legal subsisting and better title than the plaintiff.
2. Where defendant does not claim to hold himself under that title, but avers that it is vested not in the plaintiff but in others, his contention is repelled by a judgment having the force of *res judicata* rendered contradictorily between the parties themselves which decreed the plaintiffs to legally own the same.

APPEAL from the Civil District Court, Parish of Orleans.
King, J.

Gus. A. Breaux and *T. H. Thorpe*, Attorneys for Plaintiffs and Appellees:

1. Courts of justice will properly exclude testimony from the record, to which no force will be given if admitted. Bender vs. Belknap, 23 An. 765.
2. As between the parties and their heirs, authentic acts make full proof, unless attacked for forgery. C. C. 2236; Boone vs. Carroll, 35 An. 283; McKenzie vs. Bacon, 40 An. 162.
3. An attorney making a judicial averment in a suit he is prosecuting is bound absolutely by such averment, and can not thereafter be permitted to contradict it. Delacroix vs. Prevost, 6 M. 280; Denton vs. Erwin, 5 An. 23; Farrar vs. Stacey, 2 An. 211; Freeman vs. Savage, 2 An. 369; Osborn vs. Segras, 29 An. 291; Bender vs. Belknap, 23 An. 765; Folger vs. Palucer, 35 An. 743; Gaudet vs. Gauthreaux, 40 An. 189.

4. Estoppels *in judicio* are conclusive on all parties making them, simply for the averment. *Ex ore tuo, te judico*, is both the maxim and the policy of the law. Delacroix vs. Prevost, 6 M. 280; Freeman vs. Savage, 2 An. 269; Bender vs. Belknap, 23 An. 765.
5. Offers of statements of evidence not produced, and its absence not accounted for, will not authorize the admission. Nor will the offer of evidence of the existence of a counter letter be admitted in the unexplained absence of the counter letter. It is not the best evidence.
6. When an issue of title has been presented between parties to a suit they are concluded as to all titles alleged to exist prior to and at the time of trial. Schaffer vs. Scuddy, 14 An. 574; Treecot vs. Lewis, 12 An. 613; Hennen's Digest, Inj. II (612), 2; Hennen's Digest, Judg. XV (6), 35, 36.
7. As between the parties and assigns, no title can be attacked except by counter letter, whether for alleged simulation or otherwise. C. C. 2239; Hebert vs. Lege, 29 An. 512.
8. Allegations that parties holding a title translative of property, for valuable consideration, with a judgment of the Supreme Court quieting them in their ownership, are acting in fraud because they aver such a title to be theirs, is a wanton allegation, when made by a party fully cognizant of all the facts, from which he can take nothing.
9. When a tax sale is made of property assessed in the name of a total stranger to it the sale is an absolute nullity. Property must be assessed in the name of the owner. Thibodeaux vs. Keller, 29 An. 509; Fix vs. Succession Dicker, 30 An. 921.
10. The State, having acquired nothing from a sale absolutely null, could transfer no rights. Breaux vs. Negrotto, 43 An. 433.
11. "Parties are those who have the right to control the proceedings in an action. They may or may not be parties to the record; the interest they have in the suit, and not their status, determines their relation to the suit." 21 Am. and Eng. Encyc. of Law, 177; 45 An. 493.
12. "Extrinsic evidence is admissible to prove that a real party in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; and whenever this is made to appear, the real party is concluded by the judgment as effectually as if he had been a party to the record. And generally when a suit is brought in the name of one for the benefit of another, the latter, being the real party, will be barred as conclusively as if he were a party of record." 21 Am. and Eng. Encyc. of Law, 141; Follansbee vs. Walker, 74 Pa. St. 306.

Harry H. Hall for Defendant and Appellant:

1. In a petitory action plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary. 9 U. S. 267; 12 U. S. 31; 5 La. 178, 183; 10 La. 351; 14 La. 17; 1 R. 273, 378, 421; 12 R. 371; 2 An. 846; 13 An. 114; 27 An. 57; 11 An. 56.
2. Defendant is not bound to show title, but plaintiff must show his, and defendant may take advantage of any defect, radical or apparent, in plaintiff's title. 8 U. S. 105; 5 An. 678.
3. Article 2236, C. C., does not prohibit proof of simulation of an authentic act when fraud is charged. 4 R. 290; 9 An. 278.
4. One buying land from the State of Louisiana, to whom the same had been adjudicated for non-payment of taxes, is not an *assign* of the original owner under C. C., Art. 2226.

5. An attorney at law is not, by reason of having brought an unsuccessful suit for a client, claiming that the possession thereof for fifty-four years entitled her to the ownership thereof, estopped to set up against a third person, with his client's assent, a tax title in his own name, to the same property.
6. Allegations in a previous suit, based upon the same instrument, can not form matter of estoppel when it leaves the parties in the same relative position. 16 An. 190; 23 An. 647; 34 An. 1152; 39 An. 443.
7. After judgment one may allege any fact consistent therewith, although inconsistent with the allegations of the first suit. Bigelow on estoppel, p. 689.
8. One is not bound by allegations unsuccessfully pleaded. 104 Pa. St. 595; 105 Pa. St. 615.

Same counsel on Application for a Rehearing:

1. No tender of the price of the tax sale, with 10 per cent. interest, was made by plaintiffs. Quoting Constitution of the State, Art. 210.

G. A. Breaux and *T. H. Thorpe contra:*

Citing Breaux vs. Negrotto, 43 An. 433; Guidry vs. Broussard, 32 An. 926; and Stafford vs. Twitchell, 33 An. 530.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiffs allege that they are the sole heirs of Louis F. Bundy, deceased, and as such are the owners of certain immovable property situated in the Sixth District of the city of New Orleans described in their petition. That their ancestor acquired said property by notarial act of sale (which was duly recorded) on the 16th December, 1837, from John Greene; that on the 27th October, 1891, the defendant as the attorney of Julia Caroline Roe, widow of John Greene, instituted in her name a suit in the Civil District Court for the parish of Orleans against petitioners, in the petition in which suit the present defendant did aver that said Julia Caroline Roe was the owner of said property and prayed for a judgment decreeing her to be such and ordering the erasure from the records of the inscription of the act of sale from John Greene to Louis F. Bundy. That petitioners were cited to appear and answer that demand, and they did appear and answer thereto, and averred their ownership of said property and prayed to be recognized and quieted in their ownership thereof.

That upon the issue thus joined said suit was tried in the Civil District Court and final judgment was given therein rejecting the demand and decreeing the present petitioners to be the owners of said property. That from said judgment an appeal was taken by the

present defendant as attorney for Mrs. Julia Caroline Roe, widow of John Greene, to the Supreme Court, where the said judgment of the District Court was affirmed, the decree of the Supreme Court becoming final on the 27th March, 1893 (45 An., p. 398), and by virtue thereof petitioners are entitled to the undisturbed ownership and possession of said property.

That on the 28th March, 1893, the present defendant presented to the Civil District Court a petition in which he averred that he was the owner of said property by virtue of an act of sale passed June 19, 1891, to him by the Auditor of Public Accounts of the State of Louisiana, transferring to him the title of the State acquired by previous adjudication for the unpaid taxes assessed against said property for the years 1881, 1882 and 1883, in the name of one G. W. Brown, which said act of sale was recorded in the conveyance office of the parish of Orleans on the 8th of July, 1892, and said petition being allotted to Division "C" of said court, the defendant prayed for and obtained a writ of possession commanding the civil sheriff to place him in possession of said property, and in execution of said writ the sheriff did seize the same and did put defendant in possession thereof, which said possession the defendant holds and that defendant claims to hold said property as owner against petitioners and refuses to surrender same to them upon their demand. That prior to the institution of the present suit the defendant informed petitioners that he would not surrender said property to them or cancel said act of sale from said auditor to him upon payment by them to him of the sum paid by him to said auditor for said act of sale. Petitioners represent that by the judicial averment and admission made by the defendant in the petition of Julia Caroline Roe, widow of John Greene, against petitioners, in the suit referred to, that she was the owner of said property the defendant was, and is, in equity and by law forever estopped from asserting or claiming in or for himself against petitioners any ownership of or title to said property, acquired or existing at or before the making of said judicial averment or admission, which estoppel they expressly plead in perpetual bar of defendant's claim of right of ownership and possession of said property under and by virtue of said act of sale from the auditor to him.

Petitioners further represent that by said judicial averments and admissions in said suit, the present defendant renounced and aban-

doned in favor of the parties to said suit any and all claims of right and title he may have had in or to said property, which said renunciation and abandonment they expressly plead in bar to his claim of ownership under and by virtue of said act of sale from the auditor to him.

They aver that the adjudication of said property to the State of Louisiana, recited in the act of sale of the auditor to the defendant, was and is an absolute nullity upon its face, and conferred no right or title in or to said property for this, to-wit: That said adjudication was made in the proceeding of the State of Louisiana vs. G. W. Brown, for taxes of the years 1881, 1882 and 1883, assessed in the name of said Brown; that said Brown was not during those years, nor had he ever been since the year 1837, the owner of said property; that during said years 1881, 1882 and 1883, there was no inscription upon the records of the parish of Orleans of a title to said property in the name of said Brown; that during said years and always since December 16, 1837, petitioners and their ancestor, Louis F. Bundy, were and have been owners of said property, and their title thereto has been inscribed upon the conveyance records of the parish of Orleans continuously since the 16th day of December, 1837, and the assessment of the taxes for which said adjudication was pretended to have been made not having been in the name of the true owners of said property, nor of any one having an interest in or to the same when title was spread upon the records of the parish of Orleans, there was no assessment of taxes against said property to form the basis of said pretended adjudication, and the same was and is absolutely null and void upon its face; conferred upon the State no right or title to said property, and hence the State could confer none to defendant by the act of sale of the auditor to him, all of which was fully known to the defendant at and before the passing of the said act of sale.

Petitioners aver that by reason of all the foregoing, the defendant has taken and holds possession of said property without right or title and in bad faith, and he owes petitioners rents and revenues of the same from the commencement of said possession, to-wit: the third day of April, 1893, until delivery of said possession to them, and said rents and revenues are worth to them one hundred dollars per month.

The prayer of petitioners in the premises was that the defendant

be cited to appear and answer; that after due proceedings there be judgment in their favor, decreeing the adjudication of the property to the State of Louisiana in the proceeding of the State vs. Brown to be null, void and of no effect, and ordering the inscription of the same upon the records of the parish of Orleans to be erased, and decreeing that the act of sale of the Auditor of Public Accounts of the State of Louisiana to the defendant, purporting to transfer and convey said property, to be null, void and of no effect, and ordering the same to be canceled and the inscription thereof upon the records of the office of the Register of Conveyances of the parish of Orleans to be erased, and decreeing petitioners to be the true and lawful owners of the property described, and ordering that they be put in possession thereof and quieted as owners and possessors thereof, and condemning defendant to pay to them rents and revenues of said property at the rate of $100 per month, from April 3, 1893, until delivery of possession of the same to petitioners.

Defendant in his answer first pleads a general denial. He then admits that he is in full and complete possession of the property, and that he purchased said property from the State of Louisiana, as is evidenced by the act of June, 19, 1891, from the auditor. He avers that said act of sale was perfected as to all the world on the 6th of July, 1892, by registry of the same in the conveyance office of the parish of Orleans. He admits that he was duly put in possession of said property by judgment of the Civil District Court on April 3, 1893, and he avers that he now owns and possesses said property in full and complete and perfect ownership in good faith and under a valid title translative of ownership and a judgment of court recognizing said title and ownership. He specially denies that plaintiffs have any valid or legal title to the property thus claimed by them, averring the fact to be that the act of sale under and by virtue of which they claim said property, to-wit: a notarial act to Louis F. Bundy, deceased, December 16, 1837, was and is a mere sham and simulated title made by John Greene to L. F. Bundy solely for the convenience of the former; that neither the latter nor his heirs have ever had any interest or ownership in said property; that L. F. Bundy, during his lifetime, never had possession of said property, nor exercised nor attempted to exercise any act of ownership thereon; that plaintiffs' pretensions are fraudulent and made in bad

faith, they knowing full well that their said ancestor had no interest and no right in and to said property. He prays that their demand be rejected.

On the trial plaintiff offered in evidence a copy of the act of sale from John Greene to Louis F. Bundy, dated December 16, 1837; and also certificate of the registry thereof; also certificate of the Register of Conveyances of the non-alienation of the same after that date; also the petition in the suit of Roe vs. The Heirs of Louis F. Bundy; the amended petition in the same suit; the answer of the defendant therein; and the judgments of the District Court and the Supreme Court.

The defendant offered the act of sale from the auditor to the defendant, under date of 19th of July, 1891, and the certificate showing its registry in the conveyance office of the parish of Orleans on the 9th of July, 1892. Plaintiffs objected to this evidence on the ground that the deed antedated the filing of the suit of Roe vs. The Heirs of Bundy, and that the defendant was estopped by the judicial admissions of the petition in said suit from setting up any title in himself in conflict with the title asserted in that petition.

The court admitted the evidence, stating "the objection would go to its effect and not to its admissibility." Plaintiffs reserved a bill of exceptions. Defendant next offered without objection the record of the proceedings placing him in possession under the auditor's deed.

Upon his next offering parol testimony for the purpose of proving the averments of the answer that Bundy never had any money with which to buy this property—that he never bought it, and that the title in his name was a sham—in other words to support the averment of simulation, plaintiffs objected to all evidence offered to sustain that averment on the ground that the defendant is concluded by the terms of a notarial act from Greene to Bundy; that in the absence of an averment by him that said deed was a forgery, the law would not permit him to contradict the terms of the agreement expressed by the terms of that act; that the defendant, having failed to allege in his answer that there was fraud or error in the notarial act from Greene to Bundy, can not be heard to allege its simulation, and that he is estopped by his judicial admissions in the suit of Roe vs. The Heirs of Bundy from questioning the verity and validity of the title from Greene to Bundy.

The court sustained the objection and ruled that testimony for the

purposes sought should not be admitted on the ground that the present defendant was the attorney of Mrs. Julia Caroline Roe in the suit of Roe vs. The Heirs of Bundy; that as said attorney he had averred Mrs. Greene was the owner of the property in dispute against the heirs of Bundy; that he then held the title under which he now claims ownership and possession, which title was antagonistic both to that of his client and that of the heirs of Bundy; that he did not advance that title then and that he can not do so now; that to allow him to do so now would be to contradict his former declarations as attorney of Mrs. Greene on which the judgment of the court had been sought and obtained.

Defendant reserved a bill to this ruling of the court, the effect of which was to effectually cut off all attack upon the title of the property, as between John Greene and his widow and the plaintiffs. Defendant made no effort to support the tax title further than through the evidence already alluded to.

The court rendered judgment in favor of the plaintiffs, recognizing and decreeing them to be the true and lawful owners of the property described, and adjudging and decreeing null and void the sale of the said property evidenced by the act of sale from the Auditor of the State of Louisiana to the defendant of date of June 19, 1891, and ordering that the inscription of the same in the conveyance office of the parish of Orleans be canceled and erased, but rejecting plaintiffs' demand for rents and revenues.

Defendant has appealed.

The present action is under its pleadings petitory in character. That action is governed by well established rules, one of which is that the plaintiff must recover on the strength of his own title and not the weakness of that of the defendant. Another, that the defendant in possession claiming title has the right to require that plaintiff not only show a better title than defendant does, but a title as good as any the latter can oppose to him, whether vested in the defendant or not. The outstanding title in a third person, of which he is entitled to avail himself, must be a legal subsisting and better title than the plaintiff's, and it has been held that it must be pleaded in order that plaintiff may have notice thereof.

In the case at bar, defendant rests his own claim of ownership and possession upon an adjudication made to the State under the title of one G. W. Brown, the origin of which is neither alleged nor shown;

neither in his pleadings nor in his evidence has he as to his own actual personal rights gone beyond and behind the auditor's deed of sale to him and the recitals of the same. He does not claim to hold under the John Greene title, but seeks to avail himself of it as the title of a third person. He has attempted in this suit to establish as a fact to enure to his benefit that the John Greene title is a legal subsisting title vested in Mrs. Greene, outstanding and held adversely to that advanced as their own and relied upon by the plaintiffs. He does not claim that the Greene title is outstanding both as to Mrs. Greene and the heirs of Bundy; he contends that Mrs. Greene holds that title and denies that the plaintiffs have acquired it. Defendant overlooks the fact that the questions which he, claiming as a third person, endeavors to have collaterally looked into by us in this proceeding have been directly examined through judicial proceedings, which have terminated in a decree of this court between the very parties themselves whose clashing claims he now wishes passed upon. Mrs. Greene in that matter unsuccessfully championed her own rights as universal legatee of her husband against the present plaintiffs, who, in the suit brought by her, against them, successfully pleaded in reconvention their rights of ownership under the notarial act of sale, from her husband to the ancestor of the defendants. The right of ownership between these parties to this property has been fixed by a judgment now *res judicata*, and it can not be reopened by one who asserts himself no legal adverse interest in the Greene title. This view sustains the ruling of the district judge on the question of the admissibility of evidence to attack as being simulated the title of the Bundy heirs to the property.

The issue as to the Greene title being disposed of, defendant's rights are made to depend by him upon the tax title conveyed to him by the State. We have before us unquestionable evidence that as far back as 1837 the title of this property was placed of record as being in Louis F. Bundy, and derived by him from John Greene, and unquestionable evidence that from that time to the 8th day of July, 1892, when the defendant was placed in possession under the auditor's deed, the property was in the continuous possession of John Greene and his widow and universal legatee. In the litigation between the widow and the Bundy heirs the character of that possession was declared to have been continuously a precarious one—not legally a possession of Greene and his widow, but legally a detention

or custody by them of the property for Louis F. Bundy and his heirs. Defendant did not introduce in evidence the proceedings under which it is claimed that the property was adjudicated to the State or in any way show at what time or in what manner Brown, in whose name the property was assessed for the taxes of 1881, 1882 and 1883, became connected with it or what that connection was; he has failed to do this notwithstanding the direct and precise charge in plaintiff's petition that he never was the owner of the property and never had an interest in it. Under the pleadings and under the evidence, plaintiff's title must prevail. Lanfear vs. Harper, 13 An. 548.

It is claimed that even had this tax title been an outstanding one better than that upon which plaintiffs declare, it would not have been available to the defendant for the reason that he already held it by purchase when Mrs. Greene brought her suit against the Bundy heirs, and that instead of then advancing rights under it, adversely to the Greene title, he, on the contrary, consented to become Mrs. Greene's counsel, and as such endeavored to enforce her rights under the latter, and for that purpose had averred that John Greene and his residuary legatee, Mrs. Greene, owned the property and had been continuously in possession of the same since 1837. That the allegation of ownership in Mrs. Greene at the time of the institution of her suit was inconsistent with the contention that he was himself at that time the owner.

We are not called on to say whether this contention be well founded or not, but we think it right to say that in this case, had such an effect followed from the fact stated, it would have been the consequence not of any wrong—professional or otherwise—on the part of the defendant, but of a simple error of legal judgment. The duty which he owed his client has always been recognized and performed by him. He has never occupied a position antagonistic to her; on the contrary, his efforts have been constantly in the direction of assisting her. If the plaintiffs, through the fact alluded to, would have gained such a vantage ground, they would have done so not because defendant had failed in any duty to them, but through the application of a rule of law which enured to their benefit. Plaintiffs themselves say in their brief that he would have renounced in favor of the parties to the first suit any claim antagonistic to either of them. Defendant would have paid the penalty of the loss of his own rights by an attempt to serve his client.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

Mr. Justice McEnery, absent, sick.

Mr. Justice Parlange takes no part.

ON APPLICATION FOR A REHEARING.

BREAUX, J. The defendant in his application for a rehearing directs attention to the fact that the plaintiffs averred in their petition that prior to the institution of the suit the defendant informed them that he would not surrender the property sued for, nor cancel the sale from the auditor to him, upon payment by them to him of the sum paid by him to the auditor as the purchase price of the property.

He adds that this allegation was put at issue by his general denial and that no evidence was introduced by plaintiffs in support of their allegation.

The price paid was	$98 50
Ten per cent	9 85
Total	$108 43

That this amount should be reimbursed and that plaintiffs should be required to pay this amount as a condition precedent to the annulling of the tax deed.

In the answer of the defendant to plaintiffs' petition he avers that he purchased the property involved in the suit from the auditor, and in support of his defence he introduced a copy of this act of sale.

The purpose was in thus introducing this act to prove title.

The issue by the pleadings was limited to a question of title of the defendant *vel non*.

No plea was made with the view of recovering the taxes paid in the event that the tax deed failed to sustain ownership in the defendant.

There was no want of tender averred and no plea whatever looking to the return of the money paid as made to appear by the tax deed.

The court therefore did not pass upon an issue not made.

This court has repeatedly held that the rights, such as those now claimed, may be pleaded in reconvention.

In the present condition of this suit, it is not possible to deter-

mine whether the taxes paid are taxes which the plaintiffs should reimburse.

The records do not disclose that they were the only taxes paid upon the property during the time for which the alleged payment was made, or that they are taxes for the payment of which the owner is responsible.

We would have no authority to recall and annul judgments rendered contradictorily, on the ground that plaintiff should have made a tender of the amount of taxes paid for the reason we have already given—that no plea of the want of tender has been made.

And no proof had been admitted to show that the taxes were taxes for which the plaintiff was responsible.

To be more explicit on this point, if the taxes, though assessed in the name of a third person not the owner, were the only taxes assessed on the property and the State received the amount as taxes due on the property (and no other taxes were assessed and paid), the property would have received a benefit for which the owner should account, although the tax deed was not valid.

We have not the facts before us to determine if such was the case in matter of the property in controversy in this suit.

The defendant's rights for taxes paid, whatever they may be, will be protected by reserving to him his right to sue for reimbursement for any amount he may have paid on account of taxes against the property enuring to the benefit of the plaintiffs.

This reservation having been made, our previous decree remains and rehearing is refused.

No. 11,368.

DELIA JACKSON, INDIVIDUALLY AND AS TUTRIX, VS. ILLINOIS CENTRAL RAILROAD COMPANY.

46 226
107 139
46 226
118 614

1. In a suit for damages for the death of a person alleged to have been caused by the negligence of the employes of a railroad company, where the plaintiffs allege themselves to be the widow and children of the deceased (the widow suing for herself individually and for the minors as their mother and tutrix), defendant is not entitled under an unrestricted offer or tender of evidence to introduce generally and *against all the plaintiffs* an extra-judicial admission made by the mother since the institution of the suit, that she was not married to the deceased, when prior to this admission she had testified as a witness in the case that she was his widow. Had she sued alone and in her own behalf, such an admission, if legally proved, was admissible against her. *Quoad* admissions made by her as affecting herself, her *status* as a party was not merged into that of a witness.

2. Where, in such a case, the Supreme Court has grave doubts as to the fact of the marriage of the plaintiff with the deceased, it will remand the case for a new trial, notwithstanding the verdict of a jury and the judgment thereon rendered.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

B. R. Forman, Attorney for Plaintiff and Appellee:

1. Neither a license, witnesses, nor a written act, are essential to the validity of a marriage. It may be proved by any competent evidence. Reputation, having cohabitation as man and wife, as well as direct testimony. Taylor vs. Smith, 3 La. 38; Holmes vs. Holmes, 5 La. 470; Hobdy vs. Jones, 2 An. 944; Hubbell vs. Inkstein, 7 An. 253; Succession Pearce, 30 An. 1169; Sabalot vs. Populus, 31 An. 854.
2. In order to contradict a witness (examined under commission or in open court) by contradictory statements—if in writing they should first be exhibited or read to the witness, if verbal the witness should be first asked whether or not she had made such statements, and an opportunity afforded for explanation.
3. *Ex parte* statements can be received in no other way; and if the contradictory statements are made after the depositions are given still the rule is not changed—party must give notice and take out a new commission. Rice on Evidence, page 618. This is especially true of the *ex parte* statements of a tutrix occupying a fiduciary relation to minors in whose behalf she is suing.
4. Gratuitous passengers are entitled to safe carriage, and can recover damages for injuries sustained by the negligence of those operating the train of a railway. Hutchinson on Carriers, Secs. 500, 563, 561; Austin vs. Great Western Ry. Co., 2 Queen's Bench Cases, 442; Jacobas vs. St. Paul & Chicago R. R. Co., 20 Minnesota, 125; Buffalo R. R. Co. vs. O'Hara, 9 American and English R. R. Cases (Pa.), 317, 1882; Railway Co. vs. Stevens, 9 U. S. 655; Ohio & Miss. Ry. Co. vs. Nickless, 71 Ind. 271; Godin vs. St. Paul & Duluth Ry. Co., 30 Minn. 217, (1883); Lemon vs. Chausler, 68 Mo. 340; Ohio & Miss. Ry. Co. vs. Selby, 47 Ind. 471; Waterbury vs. N. Y. Central R. R. Co., 17 Fed. Rep. 671.
5. Plaintiff was not a gratuitous passenger; his *labor* and the freight received for carrying the staves was the consideration for his carriage, and being lawfully on the train he was entitled to safe carriage. Ib.
6. In cases of gross negligence it is proper to give such damage as would serve as a warning to defendant. Block vs. Carrollton R. R. Co., 10 An. 40.

Farrar, Leake & Lemle, Attorneys for Defendant and Appellant:

1. The judge *a quo* should have sustained the motion for a new trial, and thus enabled defendant to have proved that plaintiffs were not the widow and minor children of James Jackson. It being patent on the face of the record, defendant could not, in the exercise of due diligence, have obtained said evidence prior to the trial herein.
2. The evidence does not establish that plaintiffs were the widow and minor children of the said James Jackson, alleged to have been killed.
3. The evidence shows that the alleged James Jackson was killed instantly; hence, no damages can be awarded for the suffering of the deceased. 44 An. 698.

4. Plaintiffs have suffered no pecuniary loss, as the evidence shows Jackson did not contribute to their support. 44 An. 689; 42 An. 827.
5. Punitive and exemplary damages can not be allowed. 42 An. 824-829; 10 An. 38.
6. The damages awarded are excessive. No damages at all should be awarded, or at the very utmost merely nominal damages. 42 An. 824.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff appears in this suit individually on her own behalf and as natural tutrix of the minors Delphine Jackson and David Jackson. She alleges that she is the widow and the minors named are the children of James Jackson, issue of her marriage with him. That on or about the 27th April, 1892, James Jackson was employed by the Brooklyn Cooperage Company to go to a point near Manchac, on the line of the Illinois Central Railroad Company, to load one of its trains with staves, which the Illinois Central Railroad had agreed to carry and transport from a point on its line of road near Manchac to New Orleans; that the Brooklyn Cooperage Company engaged for said Jackson's passage on the said railroad to be carried from New Orleans to near Manchac and return to New Orleans, and it was the duty of the said company to safely carry said Jackson, and it did carry him from New Orleans to the point on the line of the railroad near Manchac with other laborers, where they loaded the cars of the defendant company with staves; and the said Jackson was then directed to get upon the train of the defendant company to be transported back to New Orleans, which he did after dark on or about the said 27th April, 1892, and was entitled to safe carriage to New Orleans; but the officers and agents of the said Illinois Central Railroad Company were guilty of gross negligence in the operation and running of its train upon which the said Jackson was being transported, in that they had the engine reversed, with the headlight and the cowcatcher turned to the north against the end of the box car of the train, when the train was traveling at rapid speed south, so that the engineer and fireman could not look forward and see obstructions and had not the benefit of the headlight to observe obstructions, and had not the benefit of the cowcatcher to throw obstructions off the track, and when so proceeding in such a seriously negligent and dangerous manner the said engine and train ran against some cows upon the track; that no bell was rung and no whistle was blown or warning given to frighten the said cows off the track, and by reason thereof the said train was de-

railed and the said Jackson was crushed to death and killed, whereby he suffered great agony of body and mind, and damage to the sum of one thousand dollars for his sufferings, which right of action has survived to petitioner, his widow, and his two aforementioned minor children, and that petitioner individually and the said two minor children of the deceased were damaged by the loss of the husband and father aforesaid in the sum of nine thousand dollars; that the said railroad company could have prevented said killing and injury and did not do so. Petitioner prayed for judgment against the railroad company for ten thousand dollars, with legal interest from date of judgment until paid.

Defendant filed an answer denying generally all the allegations of plaintiff's petition, and specially denying that the plaintiff was the legal wife of the deceased; that Jackson was killed on its train on the 27th of April, 1892, and that it was guilty of negligence in the premises.

The case was tried by a jury, which returned a verdict in favor of plaintiff for $5000. Defendant moved for a new trial, which was overruled, and judgment having been rendered in conformity to the verdict defendant appealed.

The only testimony adduced on the trial to support the allegation that Delia Jackson was the wife of the deceased and that the two minors are his children—issue of her marriage with him, was that of the plaintiff herself and one Joseph C. Camors, the testimony of both having been taken under commission.

All that the latter said on the subject was: "I knew the late James Jackson and Delia, who he claimed as his wife, and their two children, David and Delphine. He did leave (surviving him) his said widow, Delia Jackson, and their two children."

The plaintiff herself said: "I knew the late James Jackson. He was my husband. He left myself as his widow and two minor children, one named David and the other named Delphine."

Defendant filed no cross-interrogatories to either of these parties, but prior to the issuing of the commission objected to the questions propounded, on the ground that the interrogatories were leading and suggestive of the answers.

This objection was renewed when the depositions were offered, but it was overruled. The interrogatory objected to was as follows: "Did you know the late James Jackson, who was killed on the

Illinois Central Railroad, near Kenner, about 27th of April, 1892? Did he leave a widow and minor children, and what are their names?"

After plaintiff's case was closed defendant offered in evidence an *ex parte* affidavit, made by the plaintiff before Jones Cross, notary public, on the 25th May, 1893. The affidavit was as follows:

BATON ROUGE, May 25, 1893.

To whom it may concern:

Be it known that, whereas, I, Delia Jackson, the undersigned, have recently made oath to the statement that one James Jackson, who was killed by a train on the Illinois Central Railroad on or about the —day of — 1891 or 1892, was my husband; now, therefore, I make this my declaration for the purpose of qualifying and explaining my oath aforementioned. I did not mean to swear falsely that the said James Jackson was my lawfully wedded husband or that I was legally married to him under a license from the State, but only that he claimed me as his wife and I claimed him as my husband, and that we lived together as man and wife. We were never legally married, and I did not intend to swear falsely when I called him my husband, but only called him husband as I was accustomed to do, because of his living with me in that relation, and I make this explanation because I want to state the truth in regard to the matter and have it properly understood.

her
(Signed) DELIA X JACKSON.
mark.

Witness:
(Signed) C. F. ALEXANDER.
(Signed) K. S. COLLINS.

Before me, T. Jones Cross, a notary public duly commissioned and sworn in and for the parish of East Baton Rouge and State of Louisiana, personally appeared Delia Jackson, known to me, who being duly sworn and after due reading of the foregoing statement of facts did under oath declare the same to be true and made voluntarily by her for the purpose therein set forth.

Thus done and passed at my office in the city of Baton Rouge in the presence of Messrs. Cornelius F. Alexander and Kirby S. Collins, competent witnesses, who sign as such. Delia Jackson being incompetent to write affixes her signature by mark, as attest my hand and official seal, the day and date first above written.

(Signed) T. JONES CROSS,
Notary Public.

Plaintiff objected to the introduction in evidence of this affidavit on the ground "that pursuant to an order of court a commission was issued to take the deposition of Delia Jackson, the plaintiff in this suit, and she was asked whether or not James Jackson, who was claimed to have been killed on the 27th April, 1892, had left a widow and minor children, and what were their names; that defendant was duly served with notice to cross-interrogatories and declined to cross them, and that the method of endeavoring to qualify the deposition of a witness should be by cross-questions and not by *ex parte* affidavits, inasmuch as it was impossible to show the circumstances and surroundings by which an affidavit may be obtained or extorted from the witness, and that no *ex parte* affidavits can be received, as the case had been at issue since the 25th of April, was fixed for the trial on Tuesday the 23d of May, was then continued, according to the minutes of the court, to Thursday the 25th and then to the 26th, all of which time the counsel for the defendant company gave counsel for plaintiff no notice of his intention to qualify the testimony of the witness, whose deposition was returned in court on the 23d of May and opened by the clerk. The court sustained the objection, stating that the affidavit was dated May 25, 1893, the day before the trial of the case. That there was no evidence before the court as to the manner in which the affidavit was obtained. That it might have been obtained by threats or violence. That the man who had obtained the affidavit had not been presented to the court to explain how or why he obtained it. That it might have been obtained by bribery or corruption. That it was not justice to permit an affidavit of that kind to be offered. Defendant reserved a bill of exceptions, to which, with the leave of the court, the affidavit was annexed and made part thereof. Counsel for defendant testified that knowledge of this affidavit had only come to him the evening preceding the trial and that the affidavit itself had only been handed him on the morning of the trial.

Among several grounds assigned by the defendant for the new trial, which was refused, were two which we specially mention:

1. That the court erred as matter of law in refusing to allow defendant's counsel to read to the jury the *ex parte* affidavit of Delia Jackson; that the jury are the sole judges of credibility of evidence, and the court had no right to exclude said document from the jury's consideration.

2. That defendant has discovered since the trial hereof new evidence, to the effect that Delia Jackson never at any time claimed to have been married to James Jackson, deceased, but on the contrary, that she has many times stated, in the presence of witnesses, that she never was so married, and that such evidence is set forth in the affidavits of Joseph C. Camors, J. H. Duncan, C. F. Alexander, Kirby S. Collins, and statement in the handwriting of Thomas D. Dupré, the notary before whom was taken the testimony of Joseph C. Camors and Delia Jackson, all made part of the motion for the new trial.

Camors' affidavit was to the effect that he had recently appeared before Dupré, notary, and given testimony, stating that he knew one James Jackson, colored, reported to have been killed by the Illinois Central Railroad Company, and Delia Jackson, colored, as husband and wife; that for the purpose of explaining his testimony he declared he did not mean to say that the said parties were legally married, but on the contrary, that they had only lived together as man and wife, and were not legally married. That Delia Jackson stated to him, after he made the statement, that she was not legally married to James Jackson, but that they had only lived together as man and wife; that he stated this fact to the notary; that if his testimony was made to say otherwise it was erroneous, and he desired it to be corrected so as to accord with his affidavit.

Duncan, Collins and Alexander deposed under oath that when Delia Jackson appeared before Cross, notary, they heard her make the voluntary statement that she was not legally married to James Jackson, but that she and Jackson had lived together as man and wife, and recognized each other as such.

In Dupré's statement he says: "Since the death of James Jackson I have heard Delia Jackson, who resides here (Baton Rouge), and who claims to be his wife, say that she was not legally married to Jackson; that she made this statement in his presence about the —— day of ————. She said they were living together as man and wife and she claimed him as her husband, but that they were not legally married. This statement was made on the day he took her deposition in the case of Delia Jackson vs. Illinois Central Railroad. It occurred in this manner: When I swore Joe C. Camors, she was also a witness. He objected to signing the statement that they were legally married, as he did not know, but that they had always

passed for man and wife. I then asked Delia Jackson if she had ever been legally married, and she said that she had not. This was after she had signed the deposition.

In adddition to Dupré's "statement" there was filed a deposition by him in which he declared that since the death of James Jackson he had heard Delia Jackson say that she never was legally married by a preacher with a license from the court house; that the statement was made to him after he took her deposition in the case of Delia Jackson vs. Illinois Central Railroad Company.

In overruling the motion for a new trial the court stated that defendant had not annexed to the motion an affidavit of any of its officers that it had discovered new material evidence since the judgment was rendered, although it had used every effort and diligence in its power to produce the same, as required by Art. 561 of the C. P., and hence it could not consider that ground for new trial, nor the *ex parte* affidavits in support of it.

That counsel of defendant, without showing any reason why some officer of the company could not take the required oath, requested permission to do so himself, but that it had refused this request, as counsel might well be ignorant of evidence material to the case, and yet his client be fully informed.

Referring to the exclusion of the *ex parte* affidavit of Delia Jackson by it, the court said that the plaintiff sued not only in her own right but as tutrix; that viewed as an admission, it did not consider that a mother could by affidavit admit away the rights of her minor children, and declare her children illegitimate. She could admit away her own rights, but not those of her children. That the affidavit was not offered AS AN admission, but as affecting plaintiff's testimony; that from that standpoint it understood the rule to be that the declarations of witnesses whose testimony has been taken under commission made subsequent to the taking of their testimony contradicting or invalidating their testimony as contained in the record is inadmissible in evidence if objected to; that the only way for a party to avail himself of such declarations is to sue out a second commission. That such evidence is always inadmissible until the witness whose testimony is thus sought to be impeached has been examined upon the point, and his attention particularly directed to the circumstances of the transaction so as to furnish him an opportunity for explanation or exculpation. That Rice on Evidence, p.

618, supported that view. That in the particular case before the court, not only was the manner in which the affidavit had been obtained not shown, but affiant had no opportunity to explain what representations were made to her, or to give an explanation in exculpation of her former testimony.

Counsel for defendant urge in this court that their objection to the interrogatory propounded to Delia Jackson and J. C. Camors under commission, that it was "leading," was intended to extend and did extend further than to its *mere form;* that the fact of marriage was the very fact at issue between the parties, and that instead of shaping the inquiry directly to that fact and proof thereof, the marriage was assumed in the question as having existed and the inquiry limited (on the hypothesis that there had been a marriage) to the ascertainment as to who was his widow and who were his children. That whether there had been a marriage or not was not for the witness to decide; that all the facts and circumstances going to show a marriage should, under the pleadings, have been asked and answered; that the answer of Delia Jackson that she was the "widow" of James Jackson was a "conclusion of law" and not evidence of a fact. They further urge that the *ex parte* affidavit of Delia Jackson was not offered to impeach her testimony as a witness, but as admission by her.

As the rights of the plaintiffs are essentially dependent upon the existence of a marriage between Delia and James Jackson, and the present demand must fail if sufficient evidence on that point be not adduced, however strong a case might be otherwise presented against the defendant, the state of the record on that question arrests our attention at the outset. Had the case been one in which Delia Jackson sued alone, and as widow of Jackson, resting her rights entirely upon testimony other than her own, the question of the admissibility as against her of declarations made by her subsequently to the bringing of the suit, to the effect that she had never been married to the deceased, would scarcely, we think, have been raised if established by the parol testimony of witnesses, or by written evidence duly proved up. We do not think it would have been claimed that before such declarations could be made available a foundation for their being introduced in evidence such as is required as a condition precedent in cases of the impeachment of witnesses. We understand the rule to be that all admissions mate-

rial to the issue voluntarily made by a party, whether oral or written, and however authenticated, are admissible against him. This is announced by Rice in his work on evidence (Vol. 3, page 500) as a rule *even in criminal cases.*

He refers to the two cases of People vs. McMahon, 15 N. Y. 384, and People vs. Wentz, 37 N. Y. 309. In the latter case the court, speaking of the opinion in People vs. McMahon, quoted Mr. Justice Selden as saying that "the law makes a distinction between a statement made before and one made after the accused was conscious of being charged with or suspected of the crime." If before, it is admissible in all cases, whether made under oath or without oath, upon a judicial proceeding or otherwise, but if made afterward, the law becomes at once cautious and hesitating. We do not understand plaintiff's counsel to have claimed on the trial, or to claim now, that Delia Jackson did not make the declarations stated in the affidavit at the time and place therein recited—that is to say that the affidavit did not *per se* prove those declarations to have been made by her.

Had this case been such a one as we have supposed, there being no question as to the affidavits furnishing sufficient and proper proof or authentication of the declarations themselves, we think it would have been admissible. If a party's counsel should urge surprise, or make any showing which would involve the voluntary character of the declarations or the good faith of the other side, the court should, unquestionably, as said by Mr. Justice Selden, become at once cautious and hesitating, and afford delay and every opportunity for investigation. If we vary the supposed case and introduce into it as a fact that the plaintiff should have gone upon the stand as a witness, and that subsequently she should have made declarations and admissions which negatived all right on her part in the action, would that fact alter the situation as to the admissibility of evidence of such declarations in the manner and form we have just been considering? We think not. Her *status* as a party plaintiff would not be merged into her *status* as a witness relatively to the effect of admissions made by her damaging to her case—*quoad* admissions we should consider her as a party, not a witness.

Leaving, however, hypothetical cases and coming to the case at bar, we find that plaintiff did not sue alone, but that she appears in this suit not only individually, but as the tutrix of two minors; we find

also that the rights of all the plaintiffs rest upon a common fact essentially necessary to exist and to be established by them, which is the marriage of Delia and James Jackson. When we come to examine the tender of evidence, we find the affidavit offered without restriction, as against both Delia Jackson herself and as against the minors she represents. As against the minors, we think it clear that these admissions were not admissible, and that the facts admitted would have to be established through testimony regularly taken. We think the court was right in excluding the affidavit in manner as offered. We express no opinion as to whether it should have been admitted as to Delia Jackson had it been offered simply as against her. Had it been permitted to have been introduced in that manner and the case had gone before the jury under such circumstances and full effect been given to it, we would doubtless have had the anomalous condition of the alleged rights of Delia Jackson being rejected by the jury because she was not the wife of the deceased, whilst the demand of the minors, in the same suit, would be maintained because she was his wife.

While under the circumstances of this case we sustain the action of the court in excluding the evidence offered, we find it impossible to let the verdict of the jury and the judgment of the court stand. We think that independently of the showing made by the defence, through the affidavits filed by the defence, that the testimony as to the marriage of Delia and James Jackson, particularly under the special denial of that fact in defendant's answer, is entirely too weak to justify a judgment. We attach little weight in this proceeding and under the pleadings therein to the fact that by an *ex parte* proceeding Delia Jackson was appointed natural tutrix of the minors. Whilst the affidavits which are in the record are not before us in strict regular form, we would not feel warranted in concluding either party with the doubts in our minds as to the actual rights of the parties to which they give rise. Davis vs. Dancy, 1 N. S. 589. In our opinion the district judge should have granted a new trial without reference to the technical objections assigned (C. P. 547).

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the verdict of the jury and the judgment thereon rendered, appealed from herein, be and the same are set aside, annulled, avoided and reversed, and that this case be remanded for a

new trial, with special directions to have the testimony of Delia Jackson as to her marriage with James Jackson taken either in open court or regularly under commission.

No. 11,426.

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LACAZE & REINE VS. THEIR CREDITORS.

An exception that the petition of a corporation does not show that suit was authorized, will be overruled if the affidavit accompanying the petition discloses the name of the *vice* president of the company, and affirms the truth of its allegations, the necessary inference therefrom being that the suit was apparently authorized.

APPEAL from the Twenty-first District Court, Parish of St. John the Baptist. *Rost, J.*

J. L. Gaudet for Plaintiffs and Appellees.

Prentice E. Edrington, Wm. C. Dufour, Horace L. Dufour for Opponent and Appellant:

1. No affidavit is necessary for the arrest of a fraudulent debtor under our insolvent laws; it is mere surplusage, and hence no defect in it can affect the validity of the proceedings. R. S. 1805; 18 La. 475; 11 An. 557.
2. In a suit by a corporation the use of its corporate name is sufficient, without naming any of its officers; authority to sue is matter of proof when called for, and not of pleading. Act 86 of 1888; R. S. 684; C. P. 112; C. C. 432; 33 An. 946; 2 An. 1017.

The opinion of the court was delivered by

WATKINS, J. The question for decision is raised upon an exception that was urged in favor of the insolvents and sustained—the opponent appealing from the judgment dismissing their opposition.

The commercial firm of Lacaze & Reine, and the individual members thereof, made a cession of their property, under the insolvent law of the State, and caused a meeting of their creditors to be convoked.

Subsequent to the convocation of the creditors, the Joseph Bowling Company, Limited, filed an opposition to the discharge of the insolvents, charging fraud and praying for their arrest. To this opposition the counsel for the insolvents tendered the following exception, to-wit:

"That the allegations of said petition and of the affidavit thereto attached fail to show that B. W. Bowling, styling himself the vice president of said company, is authorized to sign said affidavit or to appear in any judicial proceedings, and bind the said company in the present proceedings."

This exception was sustained and the opposition dismissed, and the opponent company, limited, has appealed.

I.

No affidavit is contemplated as accompanying an opposition to the discharge of an insolvent debtor—the law simply providing that "should any creditor of an insolvent debtor deem it necessary to * * * charge fraud against the debtor, he shall, within ten days next following the meeting of creditors, lay before the court his written opposition, stating specially the several facts of * * * fraud alleged against the insolvent debtor," without any further formality. R. S., Sec. 1802.

Consequently, we need not examine the sufficiency of the affidavit of the opponent, but confine ourselves to the allegations of the petition and affidavit in determining the merits of the exception.

II.

The question is whether the petition discloses that the opponent company, limited, is represented by a person authorized to institute the suit or opposition, and is capacitated to stand in judgment therein and bind the company in the instant proceedings.

The following is the opening paragraph, viz.:

"The petition of Joseph Bowling & Co., Limited, a corporation domiciled and doing business in the parish of Orleans, State aforesaid, with respect represents, that it is a creditor of the insolvents herein," etc., charging fraud; and the concluding paragraph is that, the premises considered "your petitioner prays," etc.

The company uses its own name and does not appear in and through its president, *vice* president, or any other person or officer for the purpose of bringing the suit. It is the accompanying affidavit alone that employs the name of B. W. Bowling, *vice* president. This was quite necessary, for the reason that the *corporation* could not make the affidavit, though it was perfectly competent for it to sue in its corporate name. The law declares that "corporations shall have

power and authority" amongst other things to "sue and be sued in their corporate name." R. S., Sec. 684.

It further declares that corporations must have a name given to them and that "it is in that name they must sue or be sued, and do all their legal acts." R. C. C. 432.

But these provisions only go to the *power*, *authority* and *capacity* of corporations. We must look into the Code of Practice to find the manner in which corporations must *enter* courts of justice in the assertion of their rights; and examining its provisions—Art. 112—we find that "bodies corporate and chartered institutions act judicially *through their proper representatives under the name or title given to them in the act of incorporation.*"

Not only must a corporation sue "under the name or title given to it in the act of incorporation," but corporations can *only* act judicially through "their proper representatives."

The case of Insurance Oil Tank Company vs. Scott, 33 An. 946, was one to restrain the defendant from infringing its trade mark, and the defendant tendered the exception that the plaintiff corporation did not appear through its proper officer as required by law. Of this exception the court said:

"The petition was in the name of the corporation without the designation of any officer. The exception was cumulated with the merits, and, on trial, it was proved that the action had been brought by the president with the approval of the board of directors. *This cures the defect.*"

The theory of that decision is, that plaintiff's failure to state, in its petition, the name of the proper representatives through whose instrumentality the suit is brought, was a defect, but that the defect had been remedied by the cumulation of the exception with the merits, and proof having been administered, on the trial of the merits, that suit had been brought with the authorization of the board of directors.

There can be no doubt of the correctness of that ruling, as the exception was tried with the merits, and the objection fully met by evidence that the suit was duly authorized.

In this case the exception is directed against the petition and accompanying affidavit; and, notwithstanding, it was unnecessary for the purposes of the opposition, yet it may be properly considered for the purpose of determining the sufficiency of the averments of

the petition; and thus, considering the petition and affidavit, it is evident that the suit was apparently authorized, the vice president of the corporation having made same, affirming the truth and correctness of the allegations of the petition.

We can not doubt that the suit was authorized, nor that B. W. Bowling, *vice* president of the corporation, represented the corporation in instituting the suit; that is to say in making the opposition.

The exception was improperly sustained, and the judgment appealed from must be reversed.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the exception be overruled, and the opposition reinstated, and the cause remanded to the court *a qua* for trial according to law; costs of appeal to be taxed against the appellee, and those of the lower court to await final judgment thereon.

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No. 11,264.

WILLIAM H. STUART ET ALS. VS. W. W. SUTCLIFFE ET ALS.

A policy of life insurance made payable to the assured, his executors, administrators and assigns, is, in law, assignable as any other incorporeal right. Such a policy does not constitute an asset of the "succession of a living person and become amenable to the denunciation of R. C. C. 2454."

APPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

Joseph Brewer, Girault Farrar, H. L. Dufour and *H. J. Delesdernier* Attorneys for Plaintiffs and Appellants:

1. Where a partnership styled "John Klein & Co." was dissolved by the death of one of its members in 1888, and shortly afterwards a new firm was formed under the same firm name, composed of different individuals, the firms are not the same, nor are the assets and liabilities of the first firm the assets and liabilities of the second firm. 19 An. 289; Abat, Generes et als. vs. Mrs. Emeline J. Penny et als.
2. Where a member of the second firm who was also a member of the first firm assigns to the second firm his policy of life insurance to secure a debt due the first firm, such assignment is null and void.
3. Where a member of a firm executes his promissory note in favor of said firm and pledges or assigns a policy of life insurance, to secure the payment of said note, said pledge or assignment is personal to said firm, and said policy can not be subsequently assigned by said firm.

4. Where a member of a firm executes his note in favor of said firm and pledges a life insurance policy to secure said note and authorizes the firm to pledge said policy, but said firm assigns said policy instead to a third person, such assignment is null and void.
5. An assignment of a life insurance policy to be valid must be signed by the person assured.
6. A life insurance policy is not negotiable.
7. A pledge can not be separated from the note to which it is attached, for if the note be worthless the pledge would be invalid.

Carroll & Carroll for Defendants and Appellees:

If the assured legally and properly assign a policy of insurance for value and in good faith, neither his heirs nor executors can ignore such assignment, or set it aside, on the ground that it is in contravention of Art. 2454, C. C. An insurance policy so assigned can not in any sense be construed as the succession of the deceased, the sale of which is prohibited. Compare Bliss on Life Insurance (Secs. 8 and 325 to 356) with Civil Code, Arts. 871 *et seq.*

One who has effected insurance on his life may assign the policy, or a part of it, to a *bona fide* creditor. 11 R. 298.

Transfers and assignments of insurance policies have often been considered by our Supreme Court and have always been dealt with as perfectly valid and proper. There is not the faintest intimation or suggestion that such assignments are contrary to good morals, or against the law. 11 R. 298; 13 An. 508; 14 An. 1; 26 An. 326.

Howe & Prentiss Attorneys for Mutual Life Insurance Company of New York, Defendant and Appellee.

The opinion of the court was delivered by

WATKINS, J. This suit is prosecuted by the executors of William Stuart, deceased, for the recovery of a policy of insurance in the Mutual Life Insurance Company of New York, for the sum of $3000, and its dividends and avails, which risk had been taken on the life of the deceased, and which, it is alleged, by its terms and by operation of law, is made payable to the heirs and legatees of the deceased; and, as such, is an asset of his succession—the present value of same aggregating at date of the death of Stuart $9215.

Plaintiffs allege that the policy is in the possession of either W. W. Sutcliffe or John Klein, who claim the right to collect from the life insurance company, but they aver that their claim is unfounded, and that the demands set up by them against Stuart are void and of no effect or validity. That said policy being an asset of Stuart's succession, no assignment or transfer thereof, whether made by said

Stuart during his life, or by any other person, is valid, because same was in contravention of the prohibitory terms of Art. 2454 of the Civil Code; and further, that the pretended assignments under which the said Klein and Sutcliffe claim to hold said policy were made without any consideration, and same were in violation of the rights of the forced heirs of said Stuart—said executors being the sole surviving issue of the deceased, who have accepted his succession with the benefit of inventory.

Upon appropriate averments and prayer a sequestration was ordered, and the policy taken into legal custody; but subsequently the indebtedness of the company was ascertained and the amount fixed at $9215, which was paid over to the sheriff, under orders of the court, to await the result of this litigation.

Klein, in his answer, avers that William Stuart, at the time a member of the partnership of John Klein & Co., which was composed of Klein, Stuart and Mrs. Widow George H. Shotwell, did, for a valid and adequate consideration, make and deliver to said partnership his certain promissory note, dated May 10, 1889, payable one year after date, for the sum of $4000, to the order of said partnership, and that to secure the payment of said note Stuart pledged and assigned to John Klein & Co. said policy of insurance, and at the same time authorized said partnership to pledge the same to any future holder.

That, on the 31st day of July, 1889, said Stuart did execute his promissory note to the order of said partnership for the sum of $2000, and in order to secure the same he further pledged and assigned said policy of insurance, and authorized said partnership to pledge the same.

He further avers that since the execution of said notes they were discounted, and the proceeds thereof placed to the credit of Stuart on account on the partnership books, and that, since that time, various transactions have taken place *pro et con*, consisting of credits to and charges against Stuart, and that, as matters now stand, his net indebtedness aggregates the sum of $5763.55, with 6 per cent. interest thereon from June 30, 1892, which amount may be diminished or increased on final liquidation of said partnership; and the right is reserved by John Klein & Co. to claim any such additional sum as may be found due on final settlement.

He further represents that the plaintiffs have no rights or claims,

except as standing in place of, and as representing the deceased, and that said credits on the books of the partnership in favor of Stuart, as well as the loan from Sutcliffe to said partnership, were lawfully made on the faith of the pledge of said policy of insurance, and that its pledge and assignment were made for a good and valuable consideration, and in perfect good faith; and that the deceased had the full benefit of the sums of money that were advanced by Klein & Co. to him, and by Sutcliffe to Klein & Co., and neither the deceased nor his heirs, or legal representatives, could legally demand the restitution of said policy, or of its avails, without first paying or restoring the amounts thus received—for all of which Stuart was responsible, personally, and as a member of the firm.

His prayer is that the demands of Klein & Co. and Sutcliffe be recognized and enforced.

The answer of Sutcliffe is that on the 13th of March, 1890, he loaned John Klein & Co., through William Stuart, a member of that partnership, the sum of $5000, for which it gave its promissory note, payable to his order one year after date; and that in order to secure payment of same, said partnership pledged to him, as collateral security, the policy of life insurance above mentioned—said note being from time to time renewed upon payment of interest.

That the said note is still unpaid, and that he is entitled to retain said policy or its proceeds now in the possession of the court, in their entirety, and apply the same to the satisfaction of said indebtedness, capital and interest—specially denying the plaintiffs' legal right to a sequestration, and praying for its dissolution.

In a supplemental petition plaintiffs alleged that for many years antecedent to his death, William Stuart was in very bad health, partially blind, and unable to transact business; and that, by reason of his physical infirmities, Klein obtained undue influence and control over him, and thus obtained from him the pledge and assignment of said policy of insurance through imposition and false pretences, from the effect of which petitioners, as his legal representatives are entitled to be relieved, and to have said pledge and assignment set aside and revoked, and the policy and its avails restored to their possession and control.

To this petition the defendant Klein pleads a general and special denial.

Upon the issues thus formulated a general judgment was rendered

in favor of the defendants which is couched in the following terms, to-wit:

"It is ordered, adjudged and decreed that there be judgment in favor of the defendants and against the plaintiffs, rejecting their demand and dissolving, setting aside and quashing the writ of sequestration issued herein, at the costs of the plaintiffs; and, inasmuch as during the pendency of these proceedings, the policy of insurance issued by the Mutual Life Insurance Company of New York, on the life of William Stuart, sequestered herein, has become due and payable, and the amount due thereunder, say the sum of $9215, has been paid over to the civil sheriff, and as said sum is in excess of the claims and debts set up as being secured by pledge and assignment of said policy, it is further ordered, adjudged and decreed that the pledge and assignment made to and in favor of the defendant, W. W. Sutcliffe, be recognized and enforced, and accordingly that out of said sum in the hands of the sheriff the said defendant, Sutcliffe, be paid the sum of $5000, with interest at the rate of 6 per cent. *per annum* from September 16, 1891, until paid, by priority and preference over all parties whatsoever; that the sheriff retain in his hands a sum which, when added to the amount to be paid said Sutcliffe as above provided, will make the total sum of $5763.55, with interest thereon at the rate of 6 per cent. *per annum* from June 30, 1892, up to the date upon which payment shall be made to said Sutcliffe as above provided; that said sum be so retained until the liquidation and settlement of the business and affairs of the partnerships of John Klein & Co. shall be effected, or until the appointment of a liquidator of said partnerships, and until the further order of this court; that the balance of the amount in the hands of the sheriff be paid over to the plaintiffs, William H. Stuart, Charles D. Stuart and Frank P. Stuart, executors of the late William Stuart; that, as to the claims of John Klein and Mrs. Sarah L. Shotwell, as members of the partnership of John Klein & Co., for and on behalf of said partnership against the plaintiffs and the succession of William Stuart, and as to the alleged transfer, assignment and pledge by William Stuart of the policy of insurance sequestered herein to said John Klein & Co. to secure said claims, the rights of all parties be reserved, to be determined and settled on the final liquidation of said partnership; that the right of the plaintiffs and the succession of William Stuart be reserved to claim and receive, on the final settlement of the business

and affairs of said partnerships of John Klein & Co., full and proper credit for the amount to be paid to the defendant, W. W. Sutcliffe, under this judgment; or such part thereof as should be properly so credited; that the Mutual Life Insurance Company of New York be released and discharged from any and all further liability under said policy of insurance; and that the plaintiffs pay all costs of these proceedings."

It is from this judgment that the plaintiffs have appealed; and, in this court, the defendants have respectively made answers to the appeal, which, in effect, request such amendments as will conform the decree of this court to the demands of their original answers.

The foregoing synopsis of the pleadings and issues of the case resolves the controversy into the following propositions, viz.:

1. That the policy of insurance by its terms, as well as by operation of law, is payable to the heirs and legatees of William Stuart, and as such, same is an asset of his succession, and no assign ment or transfer, whether made by said Stuart during his life, or any other person, is valid, because same is in contravention of the prohibitory terms of Article 2454 of the Civil Code.

2. That the pretended assignments under which Klein and Sutcliffe claim, were made without consideration, and in violation of the rights of the forced heirs,

3. That by reason of the physical infirmities and partial blindness of the deceased, John Klein obtained over him an influence and control which he could not have obtained had the deceased been in good health and in the possession of his eyesight; and that the assignment was procured by said Klein from Stuart by imposition and under false pretences.

I.

Referring to the policy, we discover that it contains the following stipulation, to-wit:

"And the company do hereby promise and agree to and with the said assured, his executors, administrators and assigns, well and truly to pay, or cause to be paid, the said sum insured *to the said assured, his executors and administrators, or assigns*, within sixty days after due notice," etc.; while the claim of the plaintiffs is that, "by its terms and by operation of law, it is payable to the heirs and legatees of the deceased," whom they personate; and "said policy being an asset of the succession of William Stuart, the assignment

thereof was in contravention of the prohibitory terms of Article 2454 of the Civil Code."

Plaintiffs do not make claim as beneficiaries of said policy, but as the executors and heirs of deceased; hence, for all purposes of this case, the plaintiffs occupy exactly the same situation as that occupied by the deceased, and can invoke no other cause of nullity than such as he could have urged while living. And it is evident that Stuart had no succession in the ordinary acceptation of the term while living, and his heirs had no inheritance.

The denunciation of Article 2454 of the Code is directed against the sale of the *succession of a living person*, which it declares not to be the subject of sale; evidently because such a sale would, in the very nature of things, be prospective and uncertain; the law declaring that "succession is the transmission of the rights and obligations of the *deceased* to his heirs." R. C. C. 871, *et seq.*

But the prohibition contemplates a sale of an entire succession; or, in other words, the sale of all that the vendor *may* own at his death. It does not purport to prohibit the sale of any single, isolated piece of property that an individual may own, such as a policy of life insurance, although it might happen to be all the property he possessed at the time; and the case would not be altered, if it should transpire that he afterward acquired no other property. To place upon the article the construction contended for by counsel would be to render it impossible for an individual to do as he pleased with his own.

There is no force in this contention and it was properly rejected in the court below.

II.

In so far as the consideration of the pledges and assignments of the policy of insurance from Stuart to John Klein & Co., and from the latter to Sutcliffe, are concerned, the proof is clear and uncontradicted to the effect that it was freely and voluntarily done on the part of Stuart, and for a fair and adequate value received in one instance, and by his procurement and instrumentality in the other.

There is neither proof nor plausible suggestion of the truth of the charge, that the pledge and assignment of the policy was obtained by Klein by means of undue influence or under false representations.

This court has for many years maintained the assignability of such

policies of insurance, as that of an incorporeal right. Succession of Risley, 11 R. 298.

The Succession of Richardson, 14 An. 1, involved quite a similar question to the one raised here—the court giving effect to an assignment made by the deceased, contemporaneously with its issuance. Summers vs. United States Insurance Company, 13 An. 504.

But in the case of Succession of Hearing, 26 An. 326, the question of the assignability of policies of insurance was expressly announced. In that case it is stated by the court that one of the policies was on the life of another man, that was transferred by the assured to Hearing and by him transferred to his wife. Of this transaction they say:

"A man may take out a policy of insurance on his life in the name of any one; or having taken it out in his own name he may, with the consent of the assurers, transfer it to whom he pleases."

We are in accord with that opinion, and it is decisive of the present controversy. But the doctrine therein announced is, in this respect, clearly contradistinguished from the principle announced as that applicable to a policy issued in favor of a wife or child as beneficiary; for on that question the court is clear and explicit. "A husband," say the court, "has the right, we think, to insure his life in the interest of his wife and child as well as in the interest of his creditor, and his obligation to provide for them in case of his death is certainly well recognized. If the policy issues to the wife, or is properly transferred to her, the amount stipulated therein belongs to her when the event insured against happens, and she can not be forced to inventory it as a part of her husband's estate. The object he had in view would be defeated if a contrary doctrine prevailed."

To the same effect is Succession of Boffinschen, 29 An. 711.

The whole question underwent a thorough and careful examination in the recent case of Putnam vs. Insurance Company, 42 An. 739, and in which we said, on reason and authority, that—

"As to her [the wife] the company's contract was complete in its incipiency, and never changed thereafter with her consent. In law this policy inured to her separate paraphernal benefit, though not separate in property from her husband, the insured, and its character of paraphernal property could not be changed to that of separate property of the husband or that of the community, without her consent, lawfully obtained. As such it could not be placed as

security for the husband's debts. To this effect are many authorities." Succession of Kuglen, 28 An. 455; Pilcher vs. New York Life Insurance Company, 33 An. 322.

The foregoing authorities make it quite clear that Stuart had the right to pledge or assign the policy in controversy, and the evidence makes it equally clear that he did pledge and assign it to the firm or partnership of John Klein & Co., and that said firm did subsequently pledge and assign it to Sutcliffe. Consequently the rights of the forced heirs of Stuart are not affected thereby and they are without interest to complain.

III.

With regard to the charge that on account of Stuart's physical infirmities and partial blindness, Klein obtained undue influence over him and thus procured his assent to the pledge and assignment by means of imposition and false pretences, there is no proof whatever. Klein, as witness, denies it *in toto*. As Stuart was aged and infirm this was doubtless a stroke in the dark, predicated on mere conjecture.

Our examination of the law and evidence has thoroughly satisfied us of the correctness of the judgment.

Judgment affirmed.

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No. 11,424.

OCTAVE SCHEXNAYDRE VS. THE TEXAS & PACIFIC RAILWAY COMPANY.

There is no restriction as to the number of trains, regular or special, which a railroad company may run over its lines, nor is there any law in this State, except in cities, to regulate their rate of speed.

In the absence of statutory regulations common prudence will regulate the rate of speed in passing stations and crossings, and the degree of negligence will be determined by the facts in each case.

Where parties, from motives of business or pleasure, cross a track, before going on it, they are required to exercise caution, care and prudence; to look and listen for an approaching train. If they do this it is not negligence to go on the track when no train is seen or heard approaching.

Where a party goes on a railroad track for the purpose of using it as a highway, he, to a certain extent, assumes all risks; it would require very gross negligence, amounting to malice, to make the railroad company liable to him; and this rule applies with greater reason when the injured party has a safer mode of travel by a public highway.

Greater care, caution and prudence are required of a deaf mute who goes on a railroad track than one in the full possession of all his senses. If he uses the raised bed as a highway, placing himself in a situation where hearing is one of the essentials of safety, it is negligence on his part.

APPEAL from the Twenty-first District Court, Parish of St. John the Baptist. *Rost, J.*

Morris Marks, H. N. Gautier and *J. L. Gaudet* Attorneys for Plaintiff and Appellee:

1. The removal of this case to the United States Court was properly refused by the lower court, the statute and Constitution of this State specially vesting State courts with jurisdiction in such cases. Act 39, 1877, Sec. 3; Constitution of 1879, Art. 246.
2. The fact that plaintiff's son was a deaf mute can not militate against him, because the gross negligence and carelessness of defendants were the immediate and direct cause of his death.
3. Had the proper signals of the approach of the train to the crossing or station by the engineer been given, the other persons who were near would have heard the same.
4. Railroad companies are required to use cautionary signals on the approach of their train to a crossing or station, and failure to do so is negligence on their part.

Howe & Prentiss and *L. De Poorter* Attorneys for Defendant and Appellee:

1. The court below erred in refusing to remove the case to the United States Circuit Court; in proceeding after due proceedings taken for removal and after refusal of Federal court to remand. 115 U. S. 10; 25 Fed. Rep. 513.
2. In order to recover damages in an action against a railroad company for personal injuries, the burden of proof is upon plaintiff to show that the accident complained of was caused by the negligence of the employés of the company, and also that the party injured did not, by his neglect, contribute to the same. 40 An. 792, 802.
3. It is the duty of a person approaching a railroad track to use his senses and to look and listen before attempting to cross. 31 An. 490; 40 An. 800; 39 An. 797; Wood's Railroad Law, Vol. 2, pp. 1312, 1313.
4. In this case, Louis Schexnaydre being deaf, it was his duty to look and use greater precaution in approaching the railway track. The fact of his being deaf was no excuse and did not call for greater care on the part of the employés of defendant. Beach Cont. Neg., p. 256, Sec. 197; p. 509, Sec. 396; 8 Ohio St. 570; 84 Penn. St. 226; 38 N. J. Law, 147; 18 N. Y. 422; 10 Allen, 532; 19 Ill. 508; 74 Ill. 399; 54 Penn. St. 396; 115 Mass. 190.
5. An engineer is not bound to check the speed of his train on seeing a man walking on the track at a considerable distance ahead of his train; and he has a right to presume that the man is possessed of his right senses, and will act upon the principles of common sense, and the motive of self-preservation common to mankind in general, and that he will, therefore, get out of the way. Beach Cont. Neg., pp. 506 and 507, Sec. 394.

6. Railroad companies have a right to run trains at all times; a traveler is not exempted from care and vigilance because the trains are irregular, or because extra trains are run; he is bound to know that these trains may be delayed, or that the company has a right to run special or extra trains. Wood's Railway Law, Sec. 323, pp. 1304, 1305 and 1327; 75 N. Y. 273; Brown Case, 42 An. 354.
7. It is contributory negligence on the part of a deaf mute to enter upon and travel on a railroad track and fail to use his sense of sight to detect whether a train is in sight or not. Loicher vs. R. R., 28 An. 320.
8. Speed is not negligence *per se*. Houston vs. V. S. & P. Ry. Co., 39 An. 796.

The opinion of the court was delivered by

McENERY, J. The plaintiff sued the defendant company for $28,300 damages for the death of his son, who was killed on the track of said company by one of its trains on the 15th December, 1890. The case was put at issue by a general denial. There was judgment for plaintiff for $20,000, and the defendant appealed.

In this case the facts are few, and the law well settled applicable to the same.

The plaintiff's son was a deaf mute and was walking on the railroad track, his back toward an approaching train, which was a special train, running at a high rate of speed. The engineer of the train gave the usual signal for the crossing, about one-half mile above Duke Station, near which the plaintiff's son was killed.

When about a quarter of a mile from Duke Station another signal of four whistles was sounded. These signals could be heard two miles on a still day. The day was clear and bright. When the last crossing signal was sounded, the engineer saw a man valking on the track. This man was the deceased son of plaintiff. The engineer did not know of his infirmity. The man paid no attention to the signal, and when within one hundred yards the engineer blew the danger signal rapidly, "very vicious and quick for a number of times." When within thirty or forty feet of the man, the engineer reversed the engine and applied the air brakes. But this last effort to avert the accident was too late and the deceased was run over.

The plaintiff's contention from these facts is that the company was guilty of negligence in running a special train at a furious speed; that proper signals had not been given before reaching Duke's Station, and that he failed to give notice to the deceased son of plaintiff of the proximity of the train.

The defendant company has the exclusive use and control of its tracks and road-bed, and it is within its discretion to run on said

tracks as many trains, regular or special, as its interests demand. There is no law regulating the speed of trains except in cities, whose crowded thoroughfares render this necessary. In the country, passing places where it is known that persons are in the habit of crossing the track in necessarily going from one place to another greater caution is required of a railroad company in running its trains than in unfrequented and scantily populated sections. In the absence of statutory regulations, common prudence requires this. It is a necessity in many places, in fact, along the entire road, for it to be crossed at certain points by persons whose business or pleasure takes them across it. In these instances the party attempting to cross the road, before going on the tracks, has to exercise prudence and care, and to look and listen for an approaching train. If he does this, it is not negligence on his part to go on the track when no train is seen approaching. But where the party goes on the track for the purpose of using it as a highway, he, to a certain extent, assumes all risks, and it would require very gross negligence, amounting to malice, to make the railroad company liable for an injury to him. And this rule is particularly applicable when the deceased or party injured has a safer mode of travel by a public highway, as in the instant case.

The deceased was a deaf mute. Greater care, caution and prudence were required from him than from one in full possession of all his senses. Knowing his infirmity, his use of the road as a highway, upon which trains at any time must pass, was in itself negligence.

The defendant company exercised all due diligence in running the train which killed the deceased. The usual and customary signals were given at the crossing, within the hearing of one not afflicted with deafness, and on the approach of the train to deceased he was given ample time, by signals, to get off the track. It was his unfortunate infirmity which caused the accident, and he was to blame for placing himself in a situation where hearing was one of the essentials of his safety.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered that there be judgment for the defendant and plaintiff's sui dismissed, with all costs.

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No. 11,241.

SUCCESSION OF MYRA CLARK GAINES.

The power of courts to order the remission of funds belonging to a foreign succession to the representatives of the succession authorized to receive them, by the courts of the domicil of the deceased, we consider undoubted. Its exercise is necessarily a matter of discretion, depending on the circumstances of each case, and is a consequence of that comity which prevails between nations in amity with each other.

The interests of commerce and civilization require that this comity should be carried into effect by our tribunals.

It is done in England and in other States of the Union, in analagous and similar cases; and whenever the rights of our citizens are not affected by the act to be done, it is the duty of this court to act on a principle which is impressed on us equally by an enlightened policy and a certainty that it will tend to the great purposes of justice.

The court having recognized the validity of the judgment probating the will of Myra Clark Gaines, pronounced in New York, in which was the domicil of the testator;

The legatees and creditors being before the court and applying to be paid here;

The assets of the succession are ordered to be distributed here, and legacies, creditors and all charges are ordered paid from the funds on hand.

The case is remanded for the disposition of the property, and for the passing upon questions at issue in accordance with views expressed.

APPEAL from the Civil District Court, Parish of Orleans. *King, J.*

Thomas J. Semmes and *Rouse & Grant* Attorneys for the Heirs, Appellees:

1. The transfer of assets to New York is a matter of judicial discretion. 95 N. Y. R. 59; 13 La. 298; 6 An. 151.
2. All administrations of successions in Louisiana are principal, not ancillary, so far as distribution of assets is concerned. C. C. 1220; 15 An. 405.
3. The registry of a foreign will does not entitle the foreign executor to exercise authority in this State. Succession of Butler, 30 An. 890.
4. The heirs are entitled to be put in possession here. C. C. 1671; 34 An. 26; 36 An. 48.

R. De Gray and *Brown & Choate* Attorneys for Legatees, Appellants:

1. Personal property has no situs but that of the owner; and its transmission by contract, inheritance or will is controlled by the law of the domicil of the owner. Succession of Packwood, 9 R. 443; Succession of McCandless, 8 An. 561; Peale vs. White, 7 An. 449; Atkinson vs. Rogers, 14 An. 633; Perin vs. McMicken, 15 An. 155; Thomas vs. Morrisat, 76 Ga. 384; 2 Kent's Com. 429; 4 Kent's Com. 513; Wilkin vs. Ellett, 9 Wall. 740. There is nothing in the statutes of Louisiana to

the contrary. Article 491, C. C., has no reference to the disposition of personal property situated in Louisiana and owned by parties domiciled in other States or foreign countries. Perin vs. McMicken, 15 An., p. 155; Succession of McCandless, 3 An. 581; Succession of Franklin, 7 An. 395.

2. The proceedings of the probate of a will in any State is a judicial proceeding under Article IV, Sec. 1, of the Constitution of the United States, and when duly authenticated under act of Congress of the 26th May, 1790—now Sec. 905, U. S. Rev. Stat.—is entitled to full faith and credit in every other State to which it may be brought. Succession of Thomas E. Bowles, 3 Rob. 34; Johnson vs. Runnels, 6 Mart., N. S., p. 622; Balfour vs. Chew, 5 Mart., N. S., p. 519; Bright vs. Whit 8 Missouri, 426; Robertson vs. Barton, 6 Monroe's Ky. Reports; Haile vs. Hill, 13 Missouri, 618; Thomas vs. Morrisat, 76 Ga. 384; Dalrymple vs. Gamble, 68 Md. 523; Green vs. Sarmiento, 3 Wash. C. C. 21; and is to have the same force and effect in the State to which it may be brought, even though such judgment could not be there rendered, as it has in the State whence it is taken. Hampton vs. McConnell, 3 Wheaton, 234; Renaud vs. Abbott, 116 U. S. 277; Carpenter vs. Strange, 141 U. S. 87; and the refusal to give said judicial proceedings such precise force and effect is a denial of a right secured under the Constitution and laws of the United States. Christmas vs. Russell, 5 Wall. 290; Green vs. Van-Buskirk, 5 Wall. 307, and 7 Wall. 139; Insurance Co. vs. Harris, 97 U. S. 331, 336; Crescent City Co. vs. Butchers' Union, 120 U. S. 141, 146, 147; Carpenter vs. Strange, 141 U. S. 87; Huntington vs. Attrill, 146 U. S. 657.

3. Any statute or law or decision denying this effect is unconstitutional and void. Christmas vs. Russell, 5 Wall. 290.

4. And when a will has been duly proved before a competent judge of the place where it was received, the order of execution in Louisiana should be granted without any other form. Civil Code, Art. 1639; Succession of Bowles, 3 Rob. 34.

5. The succession at the place of domicil of the deceased is the home or primary succession, and that at the place where property may be situated outside of the State of the home or primary succession is the ancillary succession. Story's Conflict of Laws, Sec. 513; Stevens vs. Gaylord, 11 Mass. 262, 263; Succession of Milton Taylor, 28 An. 367, 372; Borer vs. Chapman, 119 U. S. 599.

6. And it makes no difference which succession was opened first. Stevens vs. Gaylord, 11 Mass. 262, 263.

7. After the payment of creditors, costs and charges at the place of the ancillary succession, the residuum of the estate should be sent to the place of the primary or home succession for the payment of costs and charges there incurred, debts there due, and for distribution of the balance in accordance with the directions of the will, or according to law. Story's Conflict of Laws, Sec. 513; Gravelon vs. Richards, 13 La. 298, 299; Mourain vs. Poydras, 6 An. 152; Wilkins vs. Ellett, 9 Wall. 741; Freeman on Judgments, Sec. 605a.

Farrar, Jonas & Kruttschnitt Attorneys for New York Administrator, asking judgment transferring residuum of assets to Probate Court, Kings county, New York, Appellant:

1. After a Louisiana court has administered upon the estate of a non-resident dying in Louisiana, after it has satisfied the claims of home creditors, the whole estate will be transmitted to the home administrator for distribution at the domicil of the deceased and under the order of the courts located there. Mourain vs. Poydras, 6 An. 152; Succession of Milton Taylor, 25 An. 446; 28 An 367.

2. The action of the heirs for the residuum of a succession, after it has been administered upon and all debts and charges paid, is not an immovable under Art. 471, C. C.
3. That the succession itself is not an immovable unless composed of immovables.
4. That the action brought by the administrator of a foreign State for a residuum, is not an immovable.

Thos. J. Semmes and *Rouse & Grant* Attorneys for Heirs on Application for Rehearing cite: 95 N. Y., p. 55; Harvey vs. Richards, 1 Mason, p. 414; 18 How. 100.

R. DeGray and *Brown & Choate* Attorneys for Legatees:

1. When all parties in interest are before the court and admit the validity of the legacies, there is no longer any reason for their transmission; there is every reason for their payment where the fund is and when parties in interest are willing to receive the same, and no creditor or other person is to be injured thereby.

The opinion of the court was delivered by

WATKINS, J. The object of this suit is the recovery, by the New York administrator of the *primary* succession of the deceased in that State, of the *residuum* of assets of the *ancillary* succession in the State of Louisiana, from the administrator appointed under the laws thereof; and for their removal to the probate court of Kings county, New York, for the purposes of administration and distribution under and in pursuance of the laws of that State, and of the provisions of the will of the deceased therein admitted to probate.

The demand of the New York administrator, as well as that of certain legatees under the probated will, is resisted mainly on two grounds, viz.:

1. That the allowance of such an application is within the discretion of the courts of this State, and this is not a proper case for its exercise.

2. That our Civil Code requires a complete administration, within this State, of the successions of non-residents, and that the courts of this State should deal with them as if they were domestic estates.

The facts necessary to be stated as pertinent to the issues involved, and in order to a clear understanding of same, are as follows, viz.:

On the 5th of January, 1885, Mrs. Gaines made her will in the city of New Orleans, and died in this city on the ninth of that month; though she was at that time a citizen and resident of the State of New York, and temporarily absent therefrom.

Soon afterward the persons named in said will as joint testamentary executors thereof presented same to the Civil District Court for the parish of Orleans (in Louisiana) for probate, but its probate was refused on the ground that it was informal and not entitled to probate under the laws of Louisiana, though reserving proponents' right to present said will in Washington, D. C., the supposed residence of the deceased at the time of her demise.

On appeal to this court of another branch of the case, the judgment of the lower court was affirmed (38 An. 123), the proponents of this particular will having acquiesced in the judgment rendered in the court below.

There subsequently arose a controversy in the courts of this State in 1889 between one of the Christmas grandchildren and one of the Whitney grandchildren, over the administration of the Louisiana succession of deceased, and it was decided in favor of the latter, who was duly qualified (42 An. 699)—the sole asset thereof being a judgment against the city of New Orleans for the sum of $923,788.

Contemporaneously with these proceedings in Louisiana, others were inaugurated in the Surrogate's Court of Kings county, New York, for the purpose of obtaining therein the probate of the aforesaid will of Mrs. Gaines, and which resulted in a judgment of the latter court, on the 24th of June, 1891, probating it; and thereunder William B. Davenport, of New York, was appointed temporary administrator of decedent's estate in pursuance of the laws of that State.

Subsequently the administrator of the Louisiana succession of deceased filed an account, wherein are exhibited sundry large amounts as having been paid and disbursed, and certain others as of doubtful validity, the payment whereof ought to be refused, showing a large cash surplus to his credit unexpended.

The recognized legal heirs of the deceased appeared therein and preferred claim to this surplus, and their demands are resisted by five different alleged legatees of the deceased under the will that was probated by the New York court—the aggregate of whose claims are about $55,000—and also by the New York administrator.

These various parties appeared, by way of oppositions to the account, and the demands of the heirs to be placed in possession, and substantially claimed "that the balance of the funds or assets here remaining, after the payment of all debts here proved, should be paid over to said Davenport, temporary administrator, for distribution by the surrogate's court aforesaid," coupling with their demand the prayer that, in the alternative said relief should be refused, the court should order the Louisiana administrator to pay same out of the funds in his hands.

The special averments of Davenport's opposition are to the effect that there are large legacies that were created by said will, and debts due, and others contested, which must necessarily be adjusted, paid or rejected by the New York administrator, after same have been passed upon by said probate court, and for that purpose he prayed "that the said residue of the estate here remaining, after the payment of all the debts here established, be paid over to him for administration in Kings county, New York."

Its further averment is that, under the laws of New York, he, as temporary administrator, has all the powers of an administrator with a will annexed, or dative testamentary executor under the law of Louisiana, and that there are large legacies created by said will, and debts due by persons domiciled in the State of New York; and, also, amounts claimed to be due to persons there domiciled, which claims and debts must necessarily be adjusted and paid, or rejected by the administrator under the will of the deceased, in said county of Kings, in the State of New York.

Its further averment is that large amounts are also due for attorney's fees, costs and disbursements in the matter of the probate of said will, and in the matter of the defeat of another so-called will, commonly known as the Evans will; and that all of said claims should be passed upon by the said court of probates of the domicil of said deceased.

It is further alleged therein, that the administration of the deceased's estate in Louisiana has been purely auxiliary, and for the purpose of paying debts due creditors of the deceased residing in this State, or those who had obtained judgments in the courts sitting in Louisiana.

After these recitals, comes the opponents' prayer for the surrender and delivery to him of the surplus of funds remaining in the admin-

istrator's hands, after all demands against the Louisiana estate have been paid and fully satisfied.

The foregoing summary of established facts, and the truth of opponents' averments of fact, are conceded, leaving for discussion and decision only the two questions of law heretofore propounded.

On the trial all of said oppositions were dismissed, and the administrator's demand was rejected; the judgment reserving the rights of the legatees to make claim for their legacies from the Louisiana administrator, or heirs, in case the court should order the registry and execution of the decedent's will.

In a different proceeding in the same succession in Louisiana, reported in 45 An. 1237, the lower court rejected and disallowed the will which had been probated in New York, and from that judgment an appeal was prosecuted to this court, and same has this day been decided, and the judgment appealed from reversed.

In so deciding, the purport of our opinion is, that the probate of said will in New York is recognized "to the extent necessary to make it the basis of claims predicated upon it as such"—the will of deceased.

It is further to the effect that the administrator of the estate of Mrs. Gaines in Louisiana is *ancillary*, merely, and that the administration thereof in Kings county, New York, is the *primary* administration of her estate; same having been inaugurated at the place of the decedent's domicil, and predicated upon her will. It further held that these recognized and established facts must be given effect in the courts of Louisiana, as established facts.

It necessarily follows from that judgment, that the opponents can not make claim for their legacies, either from the Louisiana administrator or heirs, inasmuch as the will of deceased has not been ordered to be registered and executed here. And, just here, it must be observed and borne in mind, that this controversy contemplates no further act of administration in Louisiana, but on the contrary, it proceeds upon the opposite hypothesis that the ancillary succession here has been closed, and terminated by the payment of *all* the claims proved, or provable here, only contemplating the removal of the residue of assets afterward.

Hence, the question arises whether opponents have made out, under the law, a proper case for a transfer of the *residuum* of the ancillary succession in Louisiana to the Probate Court in Kings

county, New York, for administration there, according to law and the provisions of the will.

This question arose and was decided in the case of Gravillon vs. Richards, Executor, 13 La. 298, in which Judge Eustis, as the organ of the court, expressed the following opinion:

"The power of courts to order the remission of the funds belonging to a foreign succession, to the representatives of the succession authorized to receive them by the courts of the domicil of the deceased, we consider undoubted. Its exercise is necessarily a matter of discretion, depending on the circumstances of each case, and is a consequence of that comity which prevails between nations in amity with each other. The interests of commerce and civilization require that this comity should be carried into effect by our tribunals. It is done in England and in other States of the Union, in analogous and similar cases; and whenever the rights of our citizens are not affected by the act to be done, we shall feel ourselves bound to act on a principle which is impressed upon us equally by an enlightened policy, and a certainty that it will tend to the great purposes of justice. * * *

"We therefore determine as the interests of no one will be injured thereby, that the Court of Probates ought to have placed the funds of the estate at the disposal of the syndics and curator of the vacant estate, for the purpose of their being transmitted to the place of domicil of the deceased for distribution."

The same principle was recognized and reannounced in Mourain vs. Poydras, 6 An. 151, and again in Succession of Taylor, 28 An. 367—and we are aware of no decision of this court to the contrary.

The cases cited by counsel for the Louisiana administrator and heirs—Heirs of Henderson vs. Rost, 15 An. 465, and Succession of Butler, 30 An. 890, are dissimilar to this case, in that the demands of foreign administrators were rejected, on the ground that they exhibited no legal title to interfere with existing administrations under the local law, before same had been concluded by the payment of debts and charges against the ancillary successions.

Nor are the provisions of Art. 1220 of the Civil Code opposed to the principle we have quoted from the cases cited—the evident intention of that article being to require the administration of the successions of persons domiciled out of the State, only to the extent of paying debts by them. The legislative act of 1842 simply requires a

foreign executor to furnish bond and security before he can undertake the administration of an estate in Louisiana.

On this question the New York jurisprudence conforms to our own. See Despard vs. Churchill, 53 N. Y. 192, and Parsons vs. Lyman, 20 N. Y. 108.

The Supreme Court has likewise held in Wilkins vs. Elliott, Administrator, 9 Wall., 740.

In the brief of opponent's counsel the following pertinent questions are propounded, viz.:

"If the power of the foreign executor to receive the assets belonging to an estate, and which are beyond the territory of the State in which he is appointed, is denied, and he has no right to ask the administrator of the ancillary estate to turn the *residuum* over to him, how, we ask, is the *residuum* ever to get to the parent or primary administration for distribution? If the foreign executor must apply and qualify here, and become an officer of this court, how is he to get the fund in this court, to the court under which the parent succession is being administered? Must he, as an officer of this court, settle with himself as an officer of the other court? And if yes, does he then do anything more than he is asking to have done now, to-wit: to have an officer of this court turn over the remaining *residuum* to the officer of that other court? If his right to receive is only (in a case like the present, where under the law of New York he is vested with title) coextensive with the territorial limits of the State of his appointment, how is he, when made an officer of this court, with a grant of power which can only be—on the same theory, coextensive with the limits of this State—to get the personal property here beyond the limits of this State?

"If such was the law, the personal property here could never be gotten beyond the limits of the State where the same may be found, to pay the debts and legacies that might be due at the testator's domicil."

In our opinion these questions find a correct answer and solution in the decisions above quoted; and, on the authority of the sound principles of jurisprudence therein formulated, we hold that the New York administrator is legally and rightfully entitled to have the *residuum* of the assets of the succession of the deceased remaining in the hands of the Louisiana administrator after all debts and charges therein have been fully paid and discharged, removed into

Surrogate's Court of Kings county, State of New York, there to be administered and distributed according to law, and in conformity to the will of the deceased.

We further hold and decide that the oppositions were incorrectly overruled and dismissed, and that same should be reinstated and sustained to the extent of authorizing the transfer of the *residuum* of assets to the surrogate's court in Kings county, New York—the rights of the opposing legatees to there assert their claims being fully reserved.

We further hold and decide that the demand of the legal heirs to be put into possession of said *residuum* of assets as an inheritance was improperly sustained and must be rejected and disallowed.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed in the following particulars, viz.:

First—By rejecting and disallowing the demands of the legal heirs of Mrs. Gaines to be placed in possession of the *residuum* of the assets of her ancillary successor after debts and charges have been paid.

Second—So as to reinstate the oppositions of the legatees and of the New York administrator; and to recognize and specially reserve the rights of said legatees to present their demands in the New York court conformably to law, and to have same therein judicially determined contradictorily with said New York administrator.

Third—So as to sustain the demands of the opponents, requiring the *residuum* of assets in the hands of the administrator of the ancillary succession in Louisiana to be transferred to the Surrogate's Court of Kings county, State of New York.

And it is further ordered and decreed that the demands of the legal heirs to be placed in possession of the *residuum* of the succession be rejected and disallowed; that the rights of the opposing legatees be reserved to present and have their claims determined in the New York court without prejudice; and that the administrator of the ancillary succession in Louisiana be ordered and required to transmit, in proper form of law, to the Surrogate's Court, Kings county, New York, the *residuum* of assets remaining in his hands after all debts and charges against said ancillary succession have been paid and discharged.

It is further and finally ordered and decreed that in the foregoing particulars the account of the administrator be amended, and in all other respects approved; and that as amended the judgment appealed

from be affirmed, costs of oppositions and appeal to be taxed against administrator and appellees.

Mr. Justice Parlange takes no part.

ON THE MATTER OF REHEARING.

BREAUX, J. The appellees applied for a rehearing and for a modification of the decree, so as to allow payment here to the legatees under the will.

In their application the legatees represent that all the legatees are before the court.

They allege that the records do not disclose that Mrs. Gaines was indebted in New York and that there is no legal necessity to send the legatees to that city to get their money.

That no creditor from New York has asked a transfer of the funds to that State, and that the transfer of the funds is a matter of discretion, depending upon the circumstances of each case.

This court having decreed that the domicil of Mrs. Gaines was in New York, attention is directed to the fact that though the decedent was domiciled in New York and the administration was auxiliary only in this State, the legatees, distributees and creditors may recover amounts due them out of the assets here.

In support of the application the following cases are cited: *In re* Hughes, 95 New York, p. 55; Harvey vs. Richards, 1 Mason, 381.

Speaking for the court Judge Story, regarding the *lex rei sitæ* in the last case, says:

"Why should not legatees and distributees be entitled to recover out of the assets here as well as creditors? It is true that legatees claim by the bounty of the testator, but it is a legal right as fixed and vested as the right of a creditor. And as to distributees the case is still stronger, for that rests not on the bounty of the intestate, but on the law of the land, which at the same time enables the creditor to receive his debt out of the assets and the next of kin to claim the residue."

Upon the authority of the decision from which we have just quoted appellees principally relied in their application for a rehearing.

The appellants also filed a brief on the application for a rehearing, from which we quote:

"The validity of the will of Mrs. Gaines being fully established, first by the decision of the Surrogate's Court of Kings county, New

York, declaring it to be the last will of the testatrix and a valid will of real and personal estate; second, by the recognition thereof as such last will by decree of this court, in No. 11,193, and third, by the admission of all parties in interest, now before the court, in their application for the modification of the decree herein, the titles of the legatees to the respective amounts therein named is beyond dispute, for they are settled by both the judgment of the court and the admission of all parties in interest.

"This being the case, it can make no difference where the legacies provided for in the will are paid, whether in the home or the ancillary succession."

The court ordered that the parties in interest be heard regarding the modification of our decree, so as to avoid as much as possible the incurring of further costs and expenses at the home succession, where there are no assets.

At this hearing all the parties in interest were present and consented to a modification of our former decree, in order that the respective claims represented be paid here, except the counsel for the administrator of the home succession in New York, who, though not a party to the agreement, interposed no special objection, but asked, if modification of the decree as applied for be granted, that the rights of his client, the temporary administrator, and of all creditors who might recover through his administration of the home succession in New York, be reserved; that the validity of these claims and charges may be established before the court contradictorily with the other parties in interest in the settlement in so far as relates to the succession funds here.

Under the circumstances payment can be ordered by the court of all funds in this State.

A final settlement may be made of the succession so far as relates to these funds.

The consent of the legatees and of the creditors of the succession support the application to pay the funds on hand to the legatees, distributees and creditors.

It would serve no useful purpose to compel the interested parties and all claimants to abandon their pleas here in a court of competent jurisdiction to renew them in another tribunal.

The funds being within the court's jurisdiction may be paid here,

and included in the settlement of the ancillary succession in this State.

The question of the judicial agency through which the settlement shall now be made arises.

Shall the present administrator continue in the discharge of his trust, or shall an executor qualify under the will? It devolves upon us to determine.

The last will and testament of Myra Clark Gaines appoints two executors.

One of the two survives and is a resident of the city of New Orleans.

This will has been probated and recognition has been given by this court to the authority of a judgment pronounced in a sister State probating the will and ordering the execution of its terms. The judgment having been rendered by the court having jurisdiction of the domicil of the testatrix, a validity now exists not previously recognized.

It follows that the payments should be made by the executor named by the testatrix and that these funds should be under his administration.

The present administrator will have to account to the executor appointed under the will.

It was stated in argument for a rehearing that certain payments had been made by the administrator here in certain legacies, and it was said on behalf of the appellants that these payments should be ignored, and that the assets should be accounted for by the administrator to the executor without reference to these payments.

That issue not being before the court it is not decided, but left to be first passed upon by the court of the first instance.

All rights are reserved to the administrator, contradictorily with the executor who may be appointed, to prove the legality and correctness of these payments on legacies and advances to the heirs, if any have been made.

It is therefore ordered, adjudged and decreed that this case be remanded to the court *a qua* to be proceeded with in accordance with law and the views herein expressed.

That the legacies, debts and charges be paid here and complete settlement made with legatees, distributees and creditors to the extent of the funds on hand; that a final accounting be given and final

account filed by the executor of his administration of these funds and of the ancillary succession in this State.

After all legal claims and charges on the part of legatees, distributees and creditors shall have been paid and all entitled to any part of these funds settled with, if there be a *residuum* as per final account of the executor, that the *residuum* be transferred to the legal representative of the estate authorized to receive it in the Surrogate's Court of Kings county, New York.

That upon proper application an executor be appointed to execute the will of Myra Clark Gaines, of January 5, 1885, probated in the Surrogate's Court of Kings county, New York, on 24th June, 1891; that he execute the will after having qualified, and that he account as herein ordered.

That the administrator of the succession in this State shall account to the executor thus appointed for all amounts received by him and for all disbursements, and render full account of his gestion.

That all questions of the validity and the effect of payments made by the administrator are left to be, in the first instance, passed upon by the court of original jurisdiction, with all needful rights to protect their respective interests reserved.

That all the rights of the temporary administrator, appointed by the Surrogate's Court of Kings county, New York, be reserved in order that he may recover all amounts due him and that all creditors with valid claims be paid in the rank due and to the extent the funds will pay them; this includes all valid claims and charges, whether presented through the temporary administrator or independently of his trust, all to be proved up and recovered contradictorily with all parties in interest.

Our former decree is set aside in so far as it may be necessary to make it conform to our decree at this time. That portion which reads: "First, by rejecting and disallowing the demands of the legal heirs of Mrs. Gaines to be placed in possession of the *residuum* of the assets of her ancillary succession after debts and charges have been paid. Second, so as to reinstate the opposition of the legatees and of the New York administrator, and to recognize and specially reserve the rights of said legatees to present their demands in the New York court, conformably to the law, and to have the same judicially determined contradictorily with said New York administrator."

That this copied portion and all of the original decree is only

changed, amended and annulled to the extent and in those respects necessary to make it conform with the decree now rendered.

This amending and annulling as made has become necessary in order to carry out the agreement of the interested parties.

In all other respects than that before provided our original decision remains.

The case having been argued and the agreement made by counsel considered, our decree is changed as above without further hearing. Without the necessity of a rehearing the modification is made and rehearing, is therefore, refused.

No. 11,358.

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SUCCESSION OF MRS. JULIE COUDER.

The son and heir, Emile Couder, sued to annul a clause of the testament of his mother, Julie Couder, in which he is charged with being a debtor to her.

In the answer of the executor of the mother's will (the defendant in the suit) the consideration of the indebtedness is alleged, and on the trial the consideration was proved.

The plaintiff interposed the plea of prescription as a bar to the recovery on the claim thus proved.

Debts of the heirs, like donations to them by the ancestor from whom they inherit, are subject to collation, and prescription is not a bar to the collation, as running at any time prior to the death of the ancestor from whom they inherit.

Prescription does not date from a day anterior to the opening of the succession, and the collation is due and exigible. The plea of prescription is overruled and the heir is ordered to collate.

APPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

Henry P. Dart Attorney for Heirs of Emile Couder, Plaintiffs and Appellees:

1. The mother of three children bequeathed her entire estate to two, with the exception of the following bequest to the third, viz.:

"I give and bequeath to my son Emile the sum of $200, in addition to the sum of $2300, which he owes me."

The son attacked the will, contending that no debt ever existed between himself and his mother; that this is a disguised attempt to disinherit him, or to trespass upon the legitime.

The legatees and executor were joined as defendants. The former made no appearance, but the executor defended. Upon this point he plead that a real debt had existed, arising out of the son's theft and embezzlement of money from his mother in 1866, and he prayed judgment therefor.

At this stage the son died, and his heirs made themselves party, and interposed a plea of prescription of one, three, five and ten years.

2. The exception was maintained; it is well founded because the debt, as alleged, had its origin in a wicked and malicious tort, committed by the son, and his liability springs from this unlawful act—*i. e.*, from the theft of $2300; and from his breach of trust in failing to account for the other sums referred to. In its origin, it is an offence, and as such is prescribed by one year. (C. C. 3536.) William vs. Greiner. 20 An. 151; Millspaugh vs. New Orleans, 20 An. 323; Wood vs. Harispe, 26 An. 511; City vs. The Bank, 31 An. 566; Edwards vs. Turner, 6 Robinson, 384; Knoop vs. Blaffer, 39 An. 27.

But if not an offence, and if contractual in its origin, it is prescribed by ten years. Southern Insurance Co. vs. Pike, 32 An. 488; Board vs. Trimble, 32 An. 793; McKnight vs. Calhoun, 36 An. 408; C. C. 3544.

The offence is laid in 1866, the parties died in 1892. It is not pretended that demand was made or promise given during that period.

The damage which results from a tortious act is not a *debt* in the eye of the law; the commission of the offence is not evidence of a promise to repair the injury by yielding damages. Foster vs. Dupré, 5 M. 16.

A claim for damages *ex delicto* does not become a *debt* until established by a judgment.

3. Defendant invokes the rule, "*Quæ temporalia sunt ad agendum, sunt perpetua ad excepiendum.*"

This is unavailing, because the rule is never applied to assist an attack; it is solely a means of defence. It is an *exception* growing out of the original demand; to be effectual it must be visceral. Girod Case, 2 An. 547; Boete vs. Lane, 3 An. 145. Thus, a vendor sued for the price may avail himself by exception of a deficiency in the quantity of the thing, though the action *quanti minoris* be prescribed, or I may plead by exception the nullity of the contract, when suit is brought to enforce it, although the *action* of nullity be prescribed. 3 N. S. 695, Davenport vs. Fortier; 1 N. S 468, Thompson vs. Milburn; 4 N. S. 500, Bushnell vs. Brown; 12 Rob. 198, Marshall vs. R. R.; 12 An. 297, Riddle vs. Krembiehe; 12 An. 164, Lafiton vs. Doiron; 13 An. 249, Dickson vs. Bell; 14 An. 868, Millaudon Case; 23 An. 68.

Reconventional demands are not *exceptions* within the purview of the rule. 2 An. 547, Girod Case; 3 An. 145, Boete vs. Laine.

Here the alleged debt is set up in reconvention to destroy a right of inheritance. Our demand does not grow out of the debt; it is not connected with it The decedent acquired no right in her son's property by reason of the debt he owed her.

4. The debt can not be pleaded in compensation, because not equally liquidated and demandable. C. C. 2209. You can not compensate a debt in money against a demand for real estate. Girod Case, 2 An. 547; C. C. 2208.

You can not plead a prescribed debt in compensation unless both debts existed *before* prescription set in. This is the test—*not* the time of filing the plea, *but* the *time when the debt originated.* C. C. 2208; Millaudon vs. Lesseps, 17 An. 246; Riddell vs. Gormley, 4 An. 140; Crow vs. Watkins, 12 An. 845; Dickson vs. Bell, 13 An. 249.

In every case where the exception *quæ temporalia* has been permitted, the defence came into existence with the obligation, or before prescription set in. See 2 La. 385.

The relation of debtor and creditor *was not created* by Mrs. Couder's death; that event merely released her usufruct on the community property, and fixed her son's status as her heir.

No question of collation is here presented; that issue is not before the court, and even though it were raised in the pleading (as it is not), the executor can not establish collation—that right belongs to the heirs. Nevertheless, there should be no difference in the application of the rule, as in principle there is no difference.

It *is* settled that the heir can not plead a prescription acquired after the ancestor's death, but the right to demand a collation of a debt already prescribed when the right of inheritance arose is not settled. See the express statement to that effect, Succession of Skipwith. 15 An. 207. The Cucullu Case, 9 An. 96, does not touch the point; there the heir had received his share in advance, and covenanted in writing to return it *by collation*. Prescription was not in the case.

6. This will is also attacked because it disposes of two specific portions of real estate in favor of the sisters, to the exclusion of the third heir. The testatrix was not absolute owner of this real property; it was the joint property of herself and her three children, inherited by the latter from their father—the late head of the community. It seems clear that she can not give the *specific* property, but only her interest in the same, and the action was properly instituted to restrict the legacy to that portion, and to reduce the portion as given to the legitime.

Even were it true, as alleged by the executor, that decedent, who was a widow in community, paid a mortgage debt due by the community upon that property, she did not thereby acquire title to the half interest of her deceased husband's estate, or exhaust the son's share therein. The payment is a matter of settlement and adjustment to be made hereafter, in a proper action between the heirs.

W. E. Murphy Attorney for Testamentary Executor, Appellant:

EVIDENCE.

1. Positive testimony on a given point must predominate over negative testimony on the same point. Story vs. Insurance Co., 37 An. 254.
2. When the testimony of two witnesses is contradictory, the one swearing affirmatively and giving a detail of circumstances will predominate. Brigham vs. Bussey, 26 An. 676.
3. A fact testified to by a competent witness will be accepted as proved, if there be no evidence to impeach his credibility. Dolhonde vs. Lemaire, 32 An. 251.
4. The evidence (unimpeached) of a disinterested witness can not be disregarded by the court. Lusse vs. Hays, 22 An. 308; Perez vs. Insurance Co , 28 An. 682.
5. The testimony of a plaintiff in his own favor against a succession should be received with the greatest caution. It is in itself of the weakest character, and unless strongly corroborated should be disregarded. Cutler vs. Succession of Collins, 37 An. 95.

PRESCRIPTION.

1. Prescription as to an act of partition is thirty years. R. C. C., Art. 1305.
2. An heir will not be relieved from the obligation of collating a debt due by him to his ancestor on the ground of prescription. Succession of Skipwith, 15 An. 209.

3. The debt of the heir to his ancestor, although prescribed, should be collated. Succession of Bougere, 9 An. 96. Even a discharge under the bankrupt law has been held not to discharge an heir from the obligation of collating. 9 An. 96.
4. A prescribed debt can be pleaded in compensation. The plea of compensation has a retroactive effect to the time plaintiff and defendant became indebted unto each other; no prescription accrues when the debts existed simultaneously. Millaudon vs. Lesseps, 17 An. 246.
5. We may use as a shield what we can not employ as a weapon. 3 N. S. 659; 4 N. S. 500; 12 An. 164; 14 An. 863; 23 An. 68.

The opinion of the court was delivered by

BREAUX, J. The mother of three children, Mrs. Pierre Couder, bequeathed her estate to two, with the exception of the following bequest to the third, viz.:

"I give and bequeath to my son Emile the sum of $200, in addition to the sum of $2300 which he owes me."

The will is dated 29th of May, 1890.

The testator departed this life on the 17th of June, 1892.

In the proceedings before the court the son, Emile, attacked the will, on the ground that no debt was ever due by him to his mother; that the will is an attempt to disinherit him; that the testatrix bequeathed property of which she was not the owner.

The plaintiff prays for judgment against the executor and the legatees, annulling and setting aside the last will of said Mrs. Julie Couder, and annulling the probate of the will. And, in the alternative, should the court not consider him entitled to that relief, he prays that the legacies be reduced conformably to the law's requirement.

The executor of the mother's succession and the legatees are joined as defendants in the suit.

The executor defends, and he pleads an indebtedness arising, he alleges, out of the son's (Emile) theft and embezzlement of money from his mother in 1866, amounting to $2525, and for other amounts, aggregating altogether $3974.

The plaintiff, Emile Couder, died shortly after the suit had been instituted. His widow and heirs, after his death, joined as parties plaintiff and prosecute in their names.

The court *a qua* decreed that the legacies be reduced to the disposable portion, and that the donations *mortis causa* be subject to adjustment and settlement of the community existing between the late Pierre Couder and the testatrix; that certain property described in the judgment is part of the community; that the declarations by the

testatrix of previous indebtedness of Emile Couder contained in her will and alleged in the reconventional demand filed in the suit is of no effect, being prescribed.

In the rule for a new trial, interposed by the executor, he avers, as grounds for a new trial, that it was affirmatively proved that the amount declared in the will of the late Mrs. Pierre Couder was justly due by Emile Couder; and that prescription does not apply in matters of succession among the heirs claiming from their author.

The questions argued by counsel and before us for our determination are whether there was an amount proved as due by the heir, Emile, to the succession of his mother, and, if proved, whether prescription applies?

The amount of the claim in the motion for a new trial was limited to the sum declared in the will as due by the plaintiff.

We dispose of the claims alleged in the petition for an additional amount with the statement that they are not proved by sufficient evidence to justify a judgment allowing them. Gillespie vs. Day, 19 La. 265.

They consist of alleged collections by plaintiff, not satisfactorily proved. If such collections were made they may have been settled.

The mother, who has carefully charged him with the amount she said was due, is silent as to these additional items. Only one witness testified regarding them.

The records do not disclose any corroborating testimony in this respect. The amount exceeds $500, and can not be considered proved on the uncorrobated testimony of one witness.

With reference to the remainder, the amount charged by the testatrix in her will, his sister testifies that it was taken by her brother Emile.

She did not see him take it, but relates circumstances showing that the contents of a tin box belonging to the mother was taken by him.

She testifies that it amounted to more than $2000.

She saw the amount counted and placed in the box. It was locked.

A short time after, on the request of the brother, it was handed to him by his mother.

He took it to his room. On its return it no longer contained the amount.

Another witness testifies, positively, that the amount thus taken was $2500.

These witnesses testify that the brother, Emile, admitted at the time that he had taken the money.

The declaration of the will is a corroboration that can not be overlooked in the dealing between the mother and son.

Upon that subject, commenting upon similar articles of the Code of France it is laid down as a correct principle:

La déclaration faite par le père de famille dans son testament que l'un de ses enfants a reçu de lui avant son décés une somme qu'il précise, ne fait pas preuve suffisante que la somme ait été en effet reçu de façon à autoriser les autres enfants à eu exiger le rapport. Basten, 10 Avril, 1854, D. P. 54, 2, 216; Dalloz et Vergé Codes Annotés, Art. 851, No. 23, etc.

No. 24. Cependant une déclaration du père commun rédigée sous forme des dispositions de dernière volonté et qui contient par notes successives séparément signées de lui les comptes des sommes avancées à chacun de ses enfants, et dont il veut que le rapport soit fait à sa succession pour qu'une égalité règne entre ses enfants quoiqu'elle ne vaille pas comme disposition testamentaire en ce que la première note serait seule datée, a été néanmoins déclaré suffisante pour que le juge décidat d'après ces notes qu'il est du rapport et en déterminat la quotité, alors surtout qu'il est reconnu que les avances ont été faites et que l'héritier ne prouve pas qu'il soit libéré. Reg. 28 Aout, 1811, J. G. Succ. 1202.

It being abstracted by the son from his mother's succession it was subject to collation.

The child is bound to collate such amounts. Succession of St. Julien Tournillion, 15 An. 263.

The object of collation is to establish equality among the heirs; each heir has a right to that equality. There would not be equality if an heir were not compelled to collate, and the restitution of an amount taken could not be forced.

The fact that the amount was taken against the will of the owner should make the collation the more imperative.

The heir should collate that which he has *taken* from his mother, the same as that he should collate sums *advanced* to him. Dalloz Dictionnaire de Jurisprudence, Title Rapport, Art. 483, No. 204.

To the same effect is Dalloz et Vergé Codes Annotés, Art. 851, No. 38. Paris 6 Mai, 1846, D. P. 462, 133.

L'enfant devant également le rapport de ce qu'il aurait détourné de la maison paternelle si l'objet était de quelque valeur. Ce serait même une restitution dont il ne se dispenserait pas (en renonçant à la succession du père). Duranton, T. J. N., 865 D. A., No. 23.

Mais cela ne s'entend, sans doute, remarque fort bien Vageille, Art. 855, No. 8, que soustractions antérieures à l'ouverture de la succession, les autres étant réglées par les Arts. 792 et 801. Dans ce premier cas Vageille accorde bien le premier rapport, mais seulement si le vol a causé une perte assez grande pour obliger le pére à quelque alienation ou à des dettes subsistantes, mais la mention qu'en porte le père dans ses papiers ne serait qu'une indication mais non une preuve determinante. Dalloz Dictionaire de Jurisprudence, Art. 483, No. 204; Dalloz et Vergé Codes Annotés, Art. 851, No. 35.

The argument of plaintiff's counsel is directed principally to the plea of prescription.

The offence, he urges, was laid in 1866 and the parties died in 1892, during which time no demand was made for the amount.

An heir had been discharged under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved 19th August, 1841. The provisions of the act extended to all debts of the insolvent existing at the time of the discharge.

The court decided that this did not release the heir from the obligation to collate. It was not within the reach of the bankrupt act. Succession of Mrs. Simon Cucullu on opposition of S. Cucullu, 9 An. 96.

A debt was not prescribed at the date of the opening of a succession. It was held that the opponent in the case was as much bound to account for "whatever he owed at the time, as he would be for a movable which he had received or taken possession of belonging to the succession." "If," adds the court, "prescription of debts previous to the death of the ancestor can relieve the heir (the debtor) from collating (upon which we express no opinion), it can not have that effect after the succession has once been opened." Succession of Skipwith, 15 An. 211.

Laurent Droit Civil Francais, Vol. 10, p. 650, propounds the question: When begins the prescription of the action to compel colla-

tion? It has been decided, says that commentator, that there is no prescription possible during the existence of the donor, for evident reasons, since the obligation to collate dates only from the date of heirship; that is, prescription runs from the date of the death of the donor.

Collation is an incident of the operation of partition; it can not be separately subjected to prescription without holding that the action of partition may be partially extinguished, in so far as relates to collation, though in full force and effect in so far as relates to a distribution of the property. This would be contradictory, for of properties to be distributed are the donations to the heirs that are subject to collation; therefore, during the time that the action for a partition lies, the action "en rapport" is inextinguished. *Eadem sensu* is Fuzier Hermann, Vol. 2, p. 255.

Marcadé, upon the subject, adds: A verbal criticism of no importance, in so far as relates to prescription: that accounting for the debt is not a "rapport" of the debt to the mass of the succession, but a payment: that it follows logically and naturally that the settlement by deducting from the portion of the heir is a payment and not a "rapport" to the succession.

This distinction between the "rapport" of donation and the payment of an advance by the heir in the settlement of a succession plays a part in the matter of the renunciation of a succession by the heir, but none in so far as relates to prescription. In the kindness of her heart the mother treated the amount, in her will, as an "advance," although it had been unlawfully taken from her.

The heir, the commentator states, must be held for the payment of debts, although he has renounced the succession, thus differencing debts from "donations" in collations.

The French authorities hold that the obligation is not prescriptible during the existence of "the ancestor" from whom the indebted heir inherits.

The jurisprudence of this court, upon the subject, is not different.

Such claims have never been held prescribed in this State.

Donations and advances constitute part of the active mass of the succession for partition and are therefore not subject to prescription before the death of the ancestor by whom it is left.

The allegation that the testatrix has included property in her lega-

cies of which she is not the owner in her absolute right is sustained by the proof.

The records disclose that the real estate described as numbers 150 and 152 Orleans, and 176 and 176 1-2 Robertson street, is property of the community lately existing between Pierre Couder and wife, deceased.

The judgment appealed from decrees that it is property of the community.

It is therefore ordered, adjudged and decreed that plaintiff's demands against the defendant to annul and set aside the last will of Mrs. Julie Couder, and to annul and set aside the probate of the will, be rejected.

A judgment is rendered against plaintiff and in favor of the succession of Julie Couder for the sum of $2300 as charged in the will of the testatrix, Julie Couder.

That in the partition, the legacies be restricted to the disposable portion of decedent's interest in the property bequeathed.

To the extent of the foregoing decree, the judgment appealed from is annulled, avoided and reversed.

In so far only as the judgment appealed from decrees that the real estate before described forms part of the community, it is decreed that it is affirmed at appellee's costs.

No. 11,430.

PHILIP DAVE VS. MORGAN'S LOUISIANA & TEXAS RAILROAD AND STEAMSHIP COMPANY.

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On the hearing of an exception to the jurisdiction of the court, it appears by the allegations, taken as true for the exception, that the defendant company carried the plaintiff, a passenger, beyond his point of destination; that he was forcibly put off at a point at which there was no station;

The wrongful act was, if truly alleged, a trespass, actionable in the parish in which the passenger was thus ejected.

APPEAL from the Eighteenth District Court, Parish of Lafourche. *Caillouet, J.*

Beattie & Beattie Attorneys for Plaintiff and Appellant:

Where a railroad carries a passenger beyond his point of destination, not stopping at that point, but stopping beyond, a mile or more, and then ejects him from the train, in the night, in the rain and in an uninhabited place, this is such

a trespass or wrongful act as gives jurisdiction to the court of the parish where the act is committed. C. P., Art. 165, Sec. 9; 33 An. 955.

Ejection from a train by the railroad officials at a point different from that of destination is an act of commission and gives rise to damages. 13 Southern Reporter, Vol. 13, No. 3, p. 166; Randall vs. New Orleans & Northeastern Railroad Company, 45 An. p. 778.

Clay Knoblock & Son and *Leovy & Blair* Attorneys for Defendant and Appellee:

The defendant company is exempted by its legislative charter from being sued elsewhere than at its domicile in New Orleans, except in cases of trespass. Acts of 1877, No. 87, Sec. 12.

A case of trespass is one based on some forcible act committed *vi et armis* on the person or property of the plaintiff. Actions *ex contractu*, express or implied, and actions *ex delicto* founded on negligence are not cases of trespass within the meaning of Sec. 12 of defendant's charter. Heirs of Gossin vs. Williams and Morgan's R. R. Co., 36 An. 186; St. Julien vs. Morgan's R. R. Co., 39 An. 1063; Payne vs. Morgan's R. R. Co., 43 An. 981; and references in the cited cases.

"The allegation that the plaintiff has been damaged does not determine the question, for damages result as well from the violation of contract, either expressed or implied, as from the commission of offences or *quasi* offences. Nor will the casual and ancillary averments of illegality, wrong, and even violence, conclude the plaintiff as to the character of his action, unless it should appear, from a fair examination of his whole petition, that an alleged tort forms the gist of his complaint." Kohn vs. Mayor of Carrollton, 10 An. 720; Brigham vs. Bussey, 26 An. 676; Montgomery vs. Levee Co., 30 An. 609.

Plaintiff's action is essentially based on the contractual relations existing between him and defendant. It is founded on an alleged breach of a contract of carriage. Hutchinson on Carriers. 2d Ed., Secs. 568, 617. See Evansville R. Co. vs. Kyte, 32 Northeastern Rep. 1134, quoted in brief, where an action, identical in all essentials with plaintiff's, was held to to be an action *ex contractu*.

Even if plaintiff's action be one *ex delicto*, it is founded on the *negligent* failure of the engineer and conductor to stop at the place where the company had contracted to carry him. It is, therefore, not a case of trespass as defined by this court in the cases cited above.

The opinion of the court was delivered by

BREAUX, J. This is an action sounding in damages. For the purpose of the trial of the exception interposed to the jurisdiction of the court the following is taken as true:

That on November 26, 1893, the plaintiff bought a railroad ticket from the defendant company, entitling him to a first-class passage from Lafourche Crossing to Rousseau station on the road. That arriving at the station in the dark he could not distinguish it as his stopping place.

That the train passed the station and went beyond, about one mile, before stopping, not having stopped at the station.

The train having stopped, he was ordered "in a very peremptory and insulting manner to get off;" did get off the train when it thus stopped, a mile or more beyond Rousseau station, in obedience to said peremptory orders; whereupon the train moved off and petitioner found that he was not at Rousseau station, but about a mile beyond, where there was no station.

That at the time he was put off it was raining very hard and there was no shelter at that point, and that by this malicious, wanton and forcible act of ejecting petitioner he was forced to walk back to Rousseau station, his original point of destination, feeling and finding his way as best he could in the dark and rain.

That the orders to him to get off the train were given by an employé of the defendant company.

The petitioner alleges a disregard of his rights and feelings, and claims damages.

The defendant filed an exception of want of jurisdiction, that under its charter it was exempted from suit elsewhere than at its domicile, except in cases of trespass, and that plaintiff's suit was not an action of trespass.

From a judgment sustaining this defence and dismissing the suit, plaintiff has appealed.

Section 12 of the defendant's charter reads as follows:

"The domicile of the company shall be in the city of New Orleans, and citation shall be served there on the president of the company, or, in his absence, on the secretary; and the company shall be sued only at its domicile, except in actions of trespass, when the company may be sued in the parish in which the trespass has taken place."

In determining the rights of the parties under the allegations made, the court considers only the constituent principles of the action and not mere inferences from them on the part of the pleader.

The question is one of trespass *vel non*. Unless the action is for trespass committed, the court was without jurisdiction.

Trespass, even in law, has a broad and comprehensive meaning.

It is defined by Blackstone, as follows: "Trespass in the most extensive sense signifies any transgression or offence against the law of society, or of the country in which we live, whether it relates to a man's person or his property; therefore, beating

another is a trespass, taking or detaining a man's goods are, respectively, trespasses, for which an action of trespass *vi et armis*, or on the cases in trover and conversions, is given by the law; so also non-performance of promises or undertaking is a trespass, upon which an action of trespass on the case in assumpsit is grounded; and in general any misfeasance or act of one man, whereby another is injuriously treated or damnified, is a transgression or trespass in its largest sense."

In its more restricted sense it is defined as an unlawful act committed with violence, or injury committed with violence to the person of another. Ejecting the passenger in the manner he was ejected, if the allegation be true, was an injury.

There was negligence in not offering him the opportunity to alight at the place of destination.

Having taken him past such station without his consent, and without being allowed a reasonable opportunity to leave the train, he has a right of action for damages that may have accrued to him.

They are not damages arising under a contract, such as are classed as *ex contractu*. They do not arise from the inexecution of an obligation, or a mere violation of the terms of the agreement in the execution.

Originally the parties may be bound under a contract and their rights decided by reference to it.

The parties may remove from the obligations of the contract entirely and torts may and frequently do occur independently of the contract.

It may be founded upon or grow out of some violation of a right created or secured by contract.

The injury, in the case at bar, includes the expulsion from the train, and in consequence, as alleged, was more of an injury than there was in the following cited cases:

"And it has been said that the liability of a passenger carrier for not stopping at a certain place and taking passengers according to public announcements made known through the public prints or in writing is one founded upon a tortious violation of a general duty, and not upon any breach of special contract." Redfield on the Law of Railways, p. 298, 6 Ed.

In another case wherein the facts were almost identical, the decision was that "in such cases the passenger would be entitled to

recover damages for the injury, because the railway company has committed a flagrant breach of duty."

The rule *volunti non fit injuria* will not apply so that it may be held that the passenger by not offering resistance precluded himself from the possibility of truly alleging that he had been violently ejected.

In trespass upon lands, or real estate, any entering into the enclosure of another without his consent is, in law, a breaking into it, and force is implied in all actions of trespass of this kind.

In trespass, arising from injury to the person, any force, however slight it may be, in the commission of an unlawful act may be sufficient to constitute the offence.

Considering the petition in its entirety, without regard, however, to possible inferences or conclusions, it does not appear that plaintiff's act in alighting was voluntary.

Ordinarily no passenger insultingly ordered to alight, while the train is stopped awaiting until he gets out, would be willing to remain in the car. Alighting under those circumstances can not be considered as precluding the passenger from maintaining an action for damages arising from trespass on his rights.

Trespass grows out of the consequence of the illegal act and force to which the injured party has been subjected.

The question of the cause of action is not before us, and is not considered, in reaching our conclusion.

The defendant having, for the exception, admitted the truth of plaintiff's allegation, we conclude that the plaintiff was compelled to leave the train and that he was rudely ejected.

If, under similar circumstances, a passenger had broken one of his limbs, or if some other serious accident had happened to him, without negligence on his part, the trespass would be manifest.

That no accident happened does not change the character of the forcible ejectment from a trespass to a violation of contract.

We do not enlarge the interpreted law laid down in Heirs of Gossin vs. Morgan Co., 36 An. 186. The design and effect of Sec. 12 remains as defined in that decision.

We hold that forcible ejectment without cause, from a train, is trespass, and actionable in the parish in which it occurred.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled and set aside, that the case be remanded and reinstated by the District Court for trial, and duly tried.

Defendant and appellee to pay costs of appeal.

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No. 11,444.

LEM SCOTT, SHERIFF, ETC., VS. THE PRESIDENT OF THE POLICE JURY OF RICHLAND ET AL.

The inspection and examination of the books and papers of a public office may be claimed on application for a *mandamus* by those who, by reason of their official position, have an interest in that examination.

In view of the relations of the sheriff as the collector of parish taxes and licenses, and that he is required to settle for his collections with the parish treasurer, who settles with the jury, the police jury must be deemed to have an interest in the examination of the sheriff's books and papers whenever the information to be elicited becomes necessary for settlement of the jury with the parish treasurer or for other purposes within the scope of the duties of the jury. 1 Greenleaf on Evidence, pp. 471, 473.

APPLICATION for *Certiorari* and Prohibition.

Wells & Wells and *Boatner & Lamkin* Attorneys for Relator:

The District Court was without jurisdiction *ratione materiæ* to issue a mandamus to the sheriff and *ex-officio* tax collector, on an application by a president and two members of a police jury who had been appointed a committee with specified power simply to employ an expert and to examine the books, records and accounts of the said officer.

That no suit nor judicial proceeding of any kind can be instituted on behalf of a police jury except through the district attorney.

Gunby & Sholars Attorneys for Respondents:

District judges can issue the writ of mandamus in cases where no moneyed demand is made, but where public interests are involved. Custodian, etc., vs. Theard, 45 An. 681.

In exercising its rights to issue writs under its supervisory powers, the Supreme Court will not transform itself into a court of appeal to reverse the rulings of the inferior court. 35 An. 365.

The opinion of the court was delivered by

MILLER, J. The relator invokes the exercise of the supervisory jurisdiction vested in this court by the Art. 90 of the State Constitution. The proceedings sought to be reviewed were in the Sixth Judicial District Court, parish of Richland. That court made peremptory a *mandamus*, directing the relator to submit books, papers and documents pertaining to his office as sheriff and *ex-officio* tax-collector, for examination by a committee appointed by the police jury of the parish, or by the expert selected by the committee. It

is claimed on behalf of the police jury and their committee that the examination proposed is to obtain information necessary for the performance of the functions of the jury. The relator here, in his petition, further avers, and in his answer and exceptions in the lower court substantially urges, that the books, except the cash book, showing the parish taxes collected are not public, but his private property; that the current tax rolls, the list of delinquent tax-payers and other books and papers he enumerates are of daily use in the office for its business, and as to his vouchers, which he supposes are demanded, he insists he can not be called upon to surrender them. Besides these grounds on which he contests the *mandamus*, he insists that the committee appointed by the jury, on whose applications the *mandamus* issued, had no authority to institute the suit or stand in judgment for the jury; that the district attorney should have sued if there was any basis for the suit, and that the petition sets forth no interest in those who applied for the *mandamus*, or any thing or object within the jurisdiction of the court.

Courts are sometimes called on to enforce rights not susceptible of estimation in money. It is fortunate for the good order of society that the judicial function in that class of controversies are not dependent on the test of the amount involved, applied in other suits that come before the court. State Constitution, Art. 11; State *ex rel.* Mayor vs. Judge, 35 An. 637; State *ex rel.* Garland vs. Theard, 45 An. 681. The contention of the relator substantially is, that the committee of the police jury had no interest to sue for the *mandamus*, and there is no subject of suit—*i. e.*, of which a court can take cognizance.

The sheriff is the tax collector for the parish, and accounts to the parish treasurer. The police jury is charged with the levy of the parish taxes; the disbursement of the taxes when collected, the appointment of the parish treasurer, and it is with the police jury the parish treasurer effects his settlements. It is advanced on the part of the police jury that the information sought to be obtained from the sheriff's books and the papers of his office was important and necessary for the performance of the duties of the jury. There is testimony in the record with reference to settlements with the parish treasurer. It is in evidence that there was no final settlement with the ex-parish treasurer. From the language of the ordinances of the jury appointing the committee to examine the

sheriff's books, as well as from the testimony, it is the fair conclusion, as is stated in the briefs for the parish committee, that the information to be desired from the sheriff's books and papers is requisite for the adjustment of the accounts of the treasurer. The court can not assume the information is sought by the jury from improper motives. The presumption arising from the action of a public body clothed with important duties, is that it passed the ordinances calling for this examination with a view of obtaining assistance in the performance of public duty. The police jury in view of their relation to the parish treasurer, and those between the parish treasurer and the sheriff, has an interest in the examination of the official books and papers pertaining to the sheriff's office. That interest we think sufficient to entitle the committee to demand the *mandamus* to compel the exhibition of such books and papers for examination. 1 Greenleaf, 471-473.

While the right of inspection of official records is to be conceded to those having the requisite interest in the subject, it must be executed with due regard to the public interest and the rights of the sheriff. The ordinances of the jury required him to deliver his official books and papers to the committee. This he declined to do.

The order of the lower court, making peremptory the *mandamus*, is that he submit his books for examination. To submit his books for examination to be conducted at his office, and within reasonable hours, will not interfere with conducting the business of the office. This is all we presume the *mandamus* requires—or should be exacted. The *mandamus* affirms only the right of inspection and examination of the books of a public office, by those having the legal interest.

It is therefore ordered, adjudged and decreed that the application in this court for the writs be refused.

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No. 11,437.

HENRIETTE GUGHLIELHMI VS. LOUIS GEISMAR.

The plaintiff in a suit *via executiva*, having been enjoined, on the ground that there was a deficiency in the measurement of the land sold by her, interposed the plea of no cause of action.

She has not thereby waived any of her rights to answer and to trial on the merits.

In the interpretation of the descriptive words of deeds and grants, fixed monuments, whether they be natural or artificial, govern.

The issues having been tried on an exception admitting the truth of the allegations, the exception is overruled and the case remanded for trial on the merits, in order that the permanent character and correctness *vel non* of the metes and bounds given in the deed may be ascertained.

APPEAL from the Twentieth Judicial District Court, Parish of Ascension. *Guion, J.*

R. N. Sims, H. Heidenhain and *Dinkelspiel & Hart* Attorneys for Plaintiff and Appellee:

1. The defendant, by authentic act, passed on the 18th of February, 1891, purchased: All and singular that certain tract or parcel of land, together with the improvements thereon * * * situate in the parish of Ascension * * * known or designated as the "Waterloo plantation," having a front of about three-fourths of a mile on the Mississippi river, containing about 1800 superficial acres, more or less, and being bounded above and in the rear by the Riverside plantation * * * and below by what is known as the New River road, which separates it from the Mt. Houmas plantation; which said plantation is more specifically described as being composed of sections 9 and 10, 47, 48 and 30 and a tract of 172 67-100 acres in the rear of section 47.

   This was clearly a sale *per aversionem*. The sale was of the "Waterloo plantation," embraced between "adjoining tenements" and well defined boundaries. The defendant did not buy certain distinct sections as limited bodies of land with fixed measurements. These sections are referred to merely by way of description, and their designation is controlled by the general designation which precedes it in the act, of the land in bulk, known as Waterloo plantation, and as being contained within fixed boundaries. C. C. 854, 2495; 14 La. 497; 7 La. 452; 5 N. S. 238; 3 La. 91; 19 La. 422; 2 La. 499; 16 La. 185; 5 La. 239; 4 La 534; 43 An. 942.

   The defendant therefore is not entitled to claim diminution of the price on account of an alleged deficiency in quantity of the land within the said designated limits of the plantation. Same authorities.

James L. Bradford and *Edward N. Pugh* Attorneys for Defendant and Appellant:

1. A sale of a certain plantation, in which the land is first described as situated on the Mississippi river, containing "about 1800 acres, more or less," with designation of a certain other plantation as bounding it above and in the rear, and a certain road or lane below, which general description is then followed by a particular description, in which it is described "more specifically," as composed of certain sections, townships and ranges, is not a sale *per aversionem*, but one of specific tracts, in which, if there is less land, by one-twentieth, than that called for in the deed, the vendee is entitled to a proportionate diminution of the price. Milliken vs. Minnis, 12 La., O. S. 539; Hoover vs. Richards, 1 Rob. 34; Phelps vs. Wilson, 16 La., O. S. 185; Craigin vs. Powell, 128 U. S. 696; 3 Wash. Real Prop. 5th Ed. 409, 422, 425, 426, 430.

2. In such a sale, even if it be held to be one *per aversionem*, if the vendor had no title and no possession to parts of the specific sections described, and those parts exceed one-twentieth of the quantity called for in the deed, whether that quantity be controlled by the general call for "1800 acres, more or less," or by the aggregate areas of all the particular sections, in either event the vendee is evicted from such parts and is entitled to a restitution or diminution, and to damages resulting from the eviction. R. C. C. 2506, 2514, 2500; 1 Rob. 362; 11 Rob. 397; 13 An. 390; 14 An. 716.

The opinion of the court was delivered by

BREAUX, J. This action is based upon an alleged deficiency of a quantity of land sold.

The price was $20,000, of which $7000 have been paid.

The plaintiff, as transferee of the notes representing the purchase price, sued out executory process on one of the notes due and owing, also for interest and 5 per cent. attorney's fee, stipulated in the deed of sale, and prays that the property be sold for cash to pay the note matured, also the interest fee and costs, and for the balance of price on terms of credit corresponding with the remaining notes unpaid.

The following is a description of the property sold:

"All and singular that certain tract or parcel of land, together with the improvements thereon and all rights, ways, privileges and appurtenances thereto belonging or in anywise appertaining, situate in the parish of Ascension, in this State, on the east or left bank of the Mississippi river, about eighty-seven miles above the city of New Orleans, known or designated as the 'Waterloo plantation;' having a front of about three-quarters of a mile on the Mississippi river, containing about 1800 superficial acres, more or less, and being bounded above and in the rear by the 'Riverside plantation,' now or formerly belonging to E. I. Mansfield, and below by what is known as the New River road, which separates it from the Mount Houmas plantation; which said 'Waterloo plantation' is more specifically described as being of sections 9 and 10 in township 10 south, range 2 east, and sections 47, 48 and 30 in township 9 south, range 2 east, and a tract of 172 67-100 acres, in the rear of said section 47, with the exception and reservation of that portion of said plantation previously conveyed to the Louisville, New Orleans & Texas Railway Company, for a right of way and depot grounds."

The defendant sued out an injunction and claims a deficiency in measurement of 463 70-100 acres, and prays for a proportionate restitution of the purchase price.

He alleges in his petition for an injunction that plaintiff in the executory proceedings is not the owner of the notes sued on, but that she holds them for account of his vendor.

The act of sale is specially referred to in the petition for injunction, and the fact that it contains the usual clauses of warranty.

It is also averred that some of the land sold by the plaintiff to Geismar is public land, and that some of it belongs and is in the possession of other persons.

The plaintiff in executory process, Henrietta Gughlielhmi, and defendant in injunction, interposed the plea of no right of action, on the ground that it was a sale *per aversionem* embraced between well defined boundaries.

The case was heard on the issues thus presented, and judgment was pronounced for the plaintiff, Henrietta Gughlielhmi.

The defendant in executory process, Louis Geismar, prosecutes this appeal.

A point for decision comes up preliminarily.

The plaintiff did not call on the defendant to prove, in a summary manner, before the judge, the truth of the facts alleged in his injunction.

She did not choose to follow this mode of defence as laid down in the Code of Practice, but instead relied upon the exception of no cause of action, and thereby for the purpose of the exception the allegations of the petition are taken as true.

The fact that plaintiff might have accepted the issues as presented after the injunction was filed, and might have considered the injunction as an answer and could have proceeded to the trial without further pleading; and the fact that she might have filed such a plea as would have compelled his opponent to prove the verity of the allegations of his petition for the injunction, are not a waiver of the rights of trial on the merits in case of the overruling of the exception of no cause of action. Wood vs. Henderson, 2 An. 220; Johnson vs. Hickley, 4 La. 285; Fletcher vs. Dauber, 21 An. 151; State vs. Booth, 28 An. 726; State *ex rel.* Negrotto vs. Judges, 45 An. 1437.

This brings us to a consideration of the exception itself and to a determination of the question, whether there was a cause of action.

If the sale was a sale *per aversionem* and the title, as the issues are made, is valid to all lands within the boundaries and there was

no error regarding the boundaries themselves, the exception was properly maintained by the court *a qua*. The decisions uniformly are that calls in a deed fixing the boundaries of the land conveyed by lands of adjacent owners will control when these boundaries are well defined, and that where the metes and bounds are given by the deed, and the quantity of a tract of land, the former, if they are well established, will prevail, although there is a deficiency in the number of acres.

In other words, if there be error as to quantity, but none as to boundary, the purchaser can not claim on account of diminution in the number of acres in the absence of all attempts at concealment and fraud.

The rule applies with equal force to divisions into townships, sections and subdivisions of sections, when preceded by a description of property by metes and bounds.

This might be illustrated in various ways:

Following, for the purpose of example, the rule of construction that the elements of description will be followed, as to which there is the least likelihood of mistake.

Let us suppose that land is sold by metes and bounds, the front boundary being the Mississippi river and the other boundaries being, if possible, equally as monumental.

Sections on the water course, sold as entire sections, although fractional, would not control.

The description fronting on the Mississippi river would control the area without regard to a superadded section as part of the description.

In Milliken vs. Minnis, 12 L. 543, the sale was not by boundary.

The inference is inevitable, if it had been a sale by metes and bounds, they would have governed.

In that case the land was on the Mississippi river, with a front of about three-quarters of a mile.

The front line extended to a fence and followed the fence to the rear, and beyond the same, containing 640 acres, more or less, being four quarter sections, as surveyed by Maxfield, Ludlow, etc.

The court says: "In seeking for the intention of the parties the whole contract must be examined, and if possible effect given to every part. The expressions *being four quarter sections as surveyed*

by Maxfield, Ludlow, etc., form an important part of the designation of the land surveyed, and can not be overlooked.

"If there had been no other description of the land it would have been sufficient to convey the four quarter sections, for which patents were afterward obtained by the defendant.

"There is no difficulty about the lane which forms the lower line. The dispute appears to have arisen from the vague manner in which the upper boundary has been described as *running on a fence* and beyond it, without saying either in what direction or to what distance. We are of opinion that a reference in the contract to the survey of Ludlow *must control the vague and indefinite description of boundaries* in other clauses of the contract." (The last italics are ours.)

The boundaries were vague and indefinite, therefore other data controlled in locating the tract of land.

In Kirkpatrick vs. McMillen *et al.*, 14 La. 497, the reference to the plan and boundaries of the streets governed, and not the lots as numbered and the measure as given.

We have not found a case in which it was held that the established well known boundary lines of the four sides of a tract of land shall not control the location in a *bona fide* sale of land thus bounded.

Courses, distances, admeasurements and ideal lines upon the ground yield to known and fixed measurements, whether natural or artificial.

These being the governing principles they must control the issues in the case at bar.

The allegations being admitted as true the plaintiff is, at this time, in the attitude of having admitted, for the purpose of the exception, that a small portion of the land in question is public land, and that some of the land is in the possession of the owner of Riverside plantation.

These issues demand hearing and further consideration.

The ruling regarding the exception is therefore annulled, that it may be ascertained how much if any of the land in question is public land, and that the dividing lines between Waterloo plantation and Riverside plantation may, if possible, be established in accordance with the calls of the deed, that read as follows, viz.: "Above and in the rear of Riverside plantation," and thereby include within correct boundaries all lands forming part of Waterloo plantation.

It is ordered, adjudged and decreed that the judgment appealed from be annulled and set aside, that the case be reinstated for trial and that same be heard on the merits, in accordance with the views above expressed. The case is therefore remanded to the District Court.

Appellee to pay costs of appeal.

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No. 11,467.

SAMUEL G. N. GATES VS. H. B. GAITHER ET AL.

An act executed in the State of Michigan, between citizens of that State, and which, by the parties to the contract, is intended to operate as a mortgage on real estate situated in the State of Louisiana, same will be given effect as a conventional mortgage, affecting third persons after due inscription.

In case an absentee is sought to be reached and affected by a decree appertaining to real estate situate here, the appointment of a curator *ad hoc* to represent him is jurisdictional, and the *modus operandi* of appointment must closely conform to the Constitution and law, on the pain of nullity.

APPEAL from the Eighth District Court, parish of Concordia. *Boatner, J. ad hoc.*

Lazerus, Moore & Luce Attorneys for Defendants and Appellees:

1. A common law mortgage, executed in a common law State, between parties residing therein, will not be given the effect of a Louisiana mortgage against third persons. C. C. 3278, 3283, 3287, 3288, 3290; 34 An. 796, 38 An. 890; 40 An. 328.
2. A common law deed will likewise not be given such effect. Same authorities.
3. A seizure under an attachment having been made prior to the recordation of the alleged common law deed, prevails against the deed.
4. A common law mortgage will not have the effect of preventing a valid adjudication by the sheriff, even though the price bid is not sufficient to discharge said common law mortgage. C. P. 679, 683, 684.

C. L. Collins and *Young & Young* Attorneys for Plaintiff and Appellant:

1. Notice to a party defendant by service on a curator *ad hoc* is a constructive service, in lieu of personal service, and the laws authorizing such service must be strictly followed. 10 M. 474; 6 R. 148; 8 An. 365; 9 An. 233; Am. and Eng. Encyc. of Law, Vol. 16, p. 817.
2. Sec. 6 of Act No. 43 of 1882 specifies that in all cases in which the clerk is empowered by this act to grant orders in case of the absence of the judge from the parish, or his recusation, the oath of the party or his attorney must be annexed to the petition or application. A judgment founded on a service on a curator *ad hoc* appointed by the clerk, without such affidavit, is null and void. 12 R. 542; 33 An. 76.

3. A judgment by default entered and confirmed without showing that the curator *ad hoc* accepted the appointment, or made an appearance in the suit, is a nullity. 2 An. 446. A judgment which is itself the object of attack for nullity can not be pleaded as *res judicata* in bar of such action. 34 An. 813; 32 An 15; 29 An. 557; 42 An. 1074; American and English Encyclopedia of Law, Vol. 21, 134.
4. A judgment against a party not legally cited is null, though the formalities of law have been complied with, unless the party was present in the parish and suffered the judgment to be executed. C. P. 612.
5. The form of a contract must be governed by the laws and usages of the place where it is passed. C. C., Art. 10; 38 An. 893.
6. It is elementary that courts of justice are bound to give effect to contracts according to their true intent and meaning. The character of a contract is to be found in the object the parties sought to accomplish rather than in the appellation they have given it. We are to look at the substance and essence of contracts, rather than to their form. Tete vs. Lanaux, 45 An. p. 1343; 14 So. Rep. 243; 5 N. S. 161; 3 An 303; 10 La. 243.
7. A common law mortgage executed in a common law State between resident citizens of that State is in the nature of a pignorative contract, by which a quasi-hypothecary right is conferred. It is recognized by the jurisprudence of this State as a contract of security, and may be enforced in a proper proceeding and showing for specific performance. Howe vs. Austin, 40 An. 323; Howe vs. Powell, 40 An. 307; 38 An. 890; 12 An. 489.
8. A debtor may validly convey his immovable property in the form of a sale, in order to secure the creditor. The continued possession by the creditor does not make the transaction void. Though in the form of a sale the conveyance does not vest the ownership in the creditor, but may give him a right to be paid out of its proceeds by priority. 31 An. 354; 1 N. S. 418; 2 N. S. 22; 14 An. 560; 5 An. 97; 8 La. 308; 10 La. 257; 1 N. S. 823; 38 An. 154; 44 An. 925.
9. The setting aside, for any cause, of the sale of an immovable made by a debtor to his creditor, who had a mortgage on the immovable, will not impair any legal rights on the property which the creditor had in virtue of his mortgage. The purchase of land can not have the effect of destroying the mortgage unless the title passes. 30 An. 1307, 1309; 8 An. 462; 13 An 601; 14 An. 590; 2 La, 551.
10. If the price offered by the highest and last bidder is not sufficient to discharge the mortgages existing on the property, and which have a preference over the judgment creditor, there shall be no adjudication. C. P., Art. 684.

The opinion of the court was delivered by

WATKINS, J. The co-defendant, Gaither, was originally the owner of the Criton plantation. He sold to another co-defendant, Washington, one-half interest, and to another co-defendant, Caskey, the remaining half interest. Subsequently Washington sold one-fourth interest to Caskey—he thus becoming three-fourths owner and Washington one-fourth owner.

Caskey executed to the plaintiff in Michigan, where both parties resided at the time, a common law mortgage upon his three-fourths interest, which was recorded on the 10th of March, 1891. Subse-

quently he executed to the plaintiff an act of sale to his three-fourths interest, which was recorded on the 26th of December, 1891.

Intermediately between said mortgage and sale—on the 29th of September, 1891—Gaither instituted suit against Caskey to revoke the sale of one-half interest in the land for the non-payment of the purchase price and to recover damages for the violation of his contract, and caused to be attached the one-fourth interest Caskey had purchased from Washington. Judgment was rendered dissolving the sale and sustaining attachment, and the amount of $600 damages was allowed. Subsequently this one-fourth was sold under *fi. fa.* and adjudicated to Gaither—he thus becoming invested again with three-fourths of the property and Washington remaining the owner of one-fourth. In partition suit between Washington and Gaither, there was a judgment ordering partition to be made by licitation of the Criton plantation, but no sale was made thereunder.

The following are the objects of this suit, to-wit:

First—The annulment of the sale of the one-fourth interest of Caskey in the Criton plantation made under attachment and *fi. fa.* in the suit of Gaither vs. Caskey.

Second—To obtain judgment against Caskey for $7000, and enforce against the Caskey one-fourth interest in the plantation that he acquired from Washington plaintiff's common law mortgage of March 10, 1891.

Third—The annulment of the judgment of partition in suit of Washington vs. Gaither *et als.*

On the trial there was a general judgment against the plaintiff and he has appealed.

I.

The averments of the petition in respect to the nullity of the judgment and sale in Gaither vs. Caskey are, 1. that said Michigan mortgage at common law has the legal effect of mortgage in Louisiana, and as such, same was in operation on the one-fourth interest in the Criton plantation *prior* to its attachment and sale; and that as said mortgage was given to secure the payment of $7000, said sale and adjudication are null, for the reason that the price of sale was insufficient to discharge the aforesaid mortgage having a preference over the attachment and sale of the judgment creditor. 2. That if said Michigan instruments are given effect as a sale of the property, then the attachment and sale were made of the property of another.

Gaither and Washington make common cause and unite in one answer, and they aver that "the common law mortgage and deed upon which the plaintiff sues and bases his demand has not the effect of a mortgage in Louisiana, nor the effect of a conveyance of real estate affecting third parties."

In the alternative they aver that if same ever existed it "was extinguished by payment or confusion, or by the alleged common law deed;" but this allegation is supplemented by the additional one, that if said deed was executed in alleged satisfaction of the aforesaid mortgage, same having been filed subsequent to the attachment of the property, it was without legal effect as a conveyance under the laws of Louisiana, and did not oust or divest their title derived through previous attachment and sale.

They also plead the proceedings and judgment in the partition suit of Washington vs. Gaither *et als.* as *res adjudicata* and as an estoppel.

On this statement it is clear that the *gravamen* of the controversy is the common law mortgage, and it must be determined by the legal effect that is to be given to it under the jurisprudence of this court —the deed not being recorded as a conveyance *prior* to the attachment it is without effect, and may consequently be omitted from the discussion. This is apparently conceded by both parties.

While noting the defendant's counsel contention in brief, to the effect that while this deed unrecorded did not affect defendant's title, it extinguished any rights Gates had under his mortgage and released its grasp upon the property, we think it quite clear that it is unfounded in law—the legal effect of an avoidance of the sale being the revival of the mortgage, which formed its consideration. Chaffe vs. Morgan, 30 An. 1307, and authorities cited; American and English Encyclopedia of Law, Vol. 15, p. 319; Cooper vs. Bigly, 13 Michigan, 463; Tower vs Divine, 39 Michigan, 443.

With reference to the main question, the precept of our law is that "the form and effect of public and private written instruments are governed by the laws and usages of the place where they are passed or executed.

"But the *effect of acts passed in one country to have effect in another country is regulated by the laws of the country where such acts are to have effect.*" R. C. C. 10.

We have, therefore, in the present discussion, *first*, to determine whether the form and effect of the instrument in question, under the

law and jurisprudence of Michigan, is such as to constitute same a mortgage at common law; and *second*, if same is in effect a mortgage in the State of Michigan, what effect is to be given it in this State, where, by its terms, same was to have effect.

The following are the recitals of the act, viz.:

"This indenture, made this twenty-fourth day of February, in the year 1891, between Joseph C. Caskey, of the city of Saginaw, in the county of Saginaw and State of Michigan, party of the first part, and Samuel G. M. Gates, of Bay City, Bay county, State of Michigan, party of the second part,

"WITNESSETH, That the said first party, in consideration of seven thousand (7000) dollars to him paid by the second party, the receipt whereof is hereby acknowledged, has granted, sold and conveyed, and by these presents does grant, sell and convey unto the said second party and to his heirs and assigns forever, an equal undivided three-fourths interest in and to that parcel of land known as the Criton plantation, situated in the parish of Concordia and State of Louisiana, and described as bounded on the north by Tecoa, east by Helena, south by swamp, and west by Cherupa, and being the south half of southwest quarter of section twenty-four, the south half of section twenty-three, all of section twenty-five, twenty-six, twenty-seven, thirty-five and thirty-six, and containing in the aggregate 3606.45 acres of land, more or less, together with the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

"And the said first party, for his heirs, executors, administrators or assigns, does covenant and agree with said second party, his heirs and assigns, that at the time of the delivery of these presents he is well seized of the above granted premises in fee simple, that they are free from all incumbrances whatever, and that he will, and his heirs, assigns, administrators and executors shall forever warrant and defend the same against all lawful claims whatever.

"*Provided*, That these presents are on the express condition that, if the said first party shall pay to the said second party all sums of money which may become due and payable from said first party to said second party at any time within one year from and after the date of these presents, according to the terms of a certain bond of even date herewith, executed by said first party and delivered to said second party, then these presents and the said bond shall cease

and be null and void. But, in case of the non-payment of the said sum or sums mentioned and described in the said bond, or the interest thereof, or any part of said principal or interest, at the time, in the manner, and at the place specified for the payment thereof, and the performance of all the conditions of the said bond, then, and in such case, it shall and may be lawful for the said party of the second part, his heirs, executors, administrators or assigns to grant, bargain, sell, release and convey the said premises, with the appurtenances, and on such sale to make and execute to the purchaser or purchasers, their heirs and assigns forever, good, ample and sufficient deed or deeds of conveyance in law, rendering the surplus moneys, if any there should be, to the said party of the first part, his heirs, executors or administrators.

"And the said party of the second part, upon payment of all sums aforesaid, and the interest thereon, according to the terms of said bond, agrees that he will forthwith execute, or cause to be executed and delivered to the said party of the first part, his heirs or assigns, a good and sufficient deed re-conveying the land above described to said party of the first part, his heirs or assigns, without fraud or delay.

"The execution and delivery of this instrument shall not hinder or prevent the said party of the first part, his heirs or assigns, from cutting, manufacturing and removing any timber now standing, or being upon the land hereinbefore described.

"*Provided*, that the security of said party of the second part shall not be impaired thereby.

"In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

"JOS. C. CASKEY. (L. S.)

"Executed in presence of—

"C. C. STEVENS,

"J. K. STEVENS,

"A. F. LEWIS."

From the foregoing recitals it appears that the act is one under private signature, and was executed in the State of Michigan by and between citizens of that State. That the consideration expressed is $7000 in cash had and received, for which the property was sold and conveyed. That the property described was real estate situated in the State of Louisiana—the act containing the *proviso* that if the

grantor shall pay all the sums of money due, at a time specified, the same shall be void, otherwise the grantee may sell and convey the property, and from the proceeds of the sale realize the amount due.

Taken as a whole, the act only evidences a *quasi* alienation of the *res*, and not an absolute title to the property—a *jus in re*, though of limited or qualified character, and defeasible upon the happening of the condition specified.

In McIlvane vs. Legare, 34 An. 926, this court said: "We consider it well settled that this court will take judicial notice of the well-known fact that the common law forms the basis of the jurisprudence of our sister States of this Union," etc. Citing Copely vs. Stanford, 2 An. 335; Whiston vs. Stodder, 8 M. 95; Colt vs. O'Callaghan, 2 An. 984.

Under the title of "*absolute conveyance intended as a mortgage*" in the American and English Encyclopedia of Law we find this principle announced, viz.:

"One of the most notable instances of an equitable mortgage is that of an absolute conveyance intended as security for a debt, and to have the effect of a mortgage." Page 675.

And it is supported by numerous authorities collated from various common law States

From the same work we find the description given of a common law mortgage in these words, viz.:

"A formal or common law mortgage has the component parts of a deed conveying the fee, with a condition added that it is to be void upon the payment of a specified debt, or the performance of some other designated thing. * * Covenants against waste are sometimes inserted." Page 788. Citing Jones on Mortgages, Sec. 60.

Applying these precepts to the instrument in question, and the inference is clear that it is a common law mortgage.

This precept has been maintained by the Michigan court, employing these words, to-wit:

"According to the well settled rules of law a deed given to secure money lent, and redeemable by its payment, is itself a mortgage," etc. Hurst vs. Beaver, 50 Michigan, 612.

In Jeffrey vs. Hursh, 58 Mich. 246, the principle is even more distinctly stated as applicable to the instrument under consideration.

"It is now settled," say the court, "as well as any principle of

law can be, that an absolute deed, with a bond or defeasance, or agreement executed at the same time, to reconvey the estate upon payment of a certain sum of money, constitute a mortgage, if the instruments are of the same date, or are executed and delivered at the same time, and as one transaction; and when this is the case, it is a conclusion of law that they constitute a legal mortgage." Citing Wilson vs. Shoenburger, 31 Penn. St. 295; Ruttonbough vs. Ludwick, *Id.* 131.

The two instruments under consideration—bond and deed—are contemporaneous in date and state the same identical consideration, and, consequently, same constitute a mortgage in the State of Michigan; and under an agreement of counsel, the laws and decisions of the courts of Michigan are to be considered as if they were formally introduced in evidence.

Hence, our conclusion is that the first question above propounded must be answered in the affirmative; and we must now determine what effect is to be given this act, as a mortgage in Louisiana, under the terms of our code. Art. 10. In determining the *effect* to be given to the act in the State of Louisiana, we must lose sight of its phraseology, and look to its substance alone, as the law and jurisprudence of the State of Michigan must be consulted with respect to its form; and, consulting the laws and jurisprudence of Michigan, we find its form is complete and perfect, so as to constitute the acts in question a valid mortgage, there. And finding same valid *in form*, in the State of Michigan, they must be assumed and treated as valid *in form* in Louisiana.

The essential difference between a mortgage at common law and one in Louisiana consists in the fact that the former is a *quasi* alienation and imports a delivery of possession, while the latter is a mere security without importing delivery to the mortgagee. R. C. C. 3290. Such an instrument as the one in question is not, *in essence*, or *in form*, a mortgage in this State; but being a mortgage *in form and in essence* in Michigan, it must be given *effect as a mortgage* in Louisiana, where it was intended to operate and have effect.

Quite a contrariety of cases of this and similar purport have been presented to this court for investigation and decision, and it will be necessary to review and analyze some of them in order to find the settled theory of our jurisprudence on this vexed question.

In Bernard vs. Scott, 12 An. 489, the court dealt with an act quite

similar to the one under consideration, the principal question being whether it was "a sale under a condition which had become absolute," or a mortgage—the property in controversy and covered by the act being situated in Louisiana, while the parties to the act resided in the States of Mississippi and Ohio, respectively.

Of this instrument this court said:

"As the parties to the instrument were both residents in States where the common law prevails; as the instrument was executed in a common law State, and in the form adopted to create a mortgage there; and as a part of the property subject to the action of the instrument was situated in the State of Mississippi, there can be no question that the original intention of the parties to the act, the grantor and the grantee, intended to create a mortgage to secure the payment of a sum of money. Citing 2 Blackstone Com. 158, and 4 Kent's Com. 159.

The court further held that as the act covered property situated in Mississippi and Louisiana, a purchaser "was bound to inquire what effect the law would give to the same; similar instruments have been held to be mortgages of property situated in a common law State, and afterward removed here. See Sinnott vs. Russell, 1 N. S. 522.

"In the case of Hayden vs. Nutt, 4 An. 71, the court recognized an instrument similar in form, executed in the State of Mississippi, and operating on the individual interest of the grantor in a tract of land situated in the State of Louisiana, as a mortgage."

Of similar import is Watson vs. James, 15 An. 386.

In Bowman vs. McElroy, 14 An. 594, it was held that "a deed of trust executed in Mississippi and recorded in this State, which expresses that it was given to secure a certain amount * * can not be enforced here against the property mortgaged, to the prejudice of other mortgage creditors, except for the amount specified."

In Miller vs. Shotwell, 38 An. 891, the decision of the court turned upon a proper construction of an act which was executed in the State of Alabama between citizens of that State on one part, and a citizen of this State on the other part, and in respect to lands situated in this State. In terms the instrument under consideration in that case was very much the same as the one under consideration in the instant case; and of it this court expressed the opinion that "the text of the instrument viewed in the light of our jurisprudence and of the laws of Alabama * * leaves no doubt in our minds as

to the true intention of the parties thereto. It was clearly to create a mortgage by way of security for the purchase price of the lands therein described."

To the same effect is Ricks vs. Goodrich, 3 An. 212; Gause vs. Bullard, 16 An. 107, and Howe vs. Austin, 40 An. 823. Indeed, there is no decision we can find, and there is not one to which we have been referred, which announces a contrary doctrine.

The act under consideration in Thibodaux vs. Anderson, 34 An. 797, was executed in the parish of St. James, this State, between citizens of this State, and couched in the form of a common law mortgage, or deed of trust—the property affected being situated in this State.

This act was duly recorded, and came in competition with a mortgage which was executed in the form prescribed for mortgages in this State. Hence the question of rank, or priority, properly arose on the distribution of the assets realized from the sale of the property under executory proceedings.

Of this particular contract this court said: "This is, indeed, the first instance of *this description* which ever was submitted to this court for determination, on a question of mortgage affecting *third* persons.

"We do not hesitate to declare that as this nondescript act does not indicate its character, and does not clearly purport on its face to be a mortgage, third persons are not bound to ascertain its nature, object and purport, by analyzing its features by systems of reasoning which do not, with certainty, conduce to the conclusion that it is an act of mortgage.

"It is easier to say what the act is not, than to say what it is. Whatever contract it was intended to evidence, it surely can not be claimed that it is expressive of a *mortgage* given by Anderson to Boyd susceptible of affecting *third* persons, although it might have been entitled to be considered as security between the parties.

"Parties *contracting in this State* are required, in all their transactions affecting *immovables situated therein*, conferring or divesting real rights in such property, to *comply with the forms prescribed by the local law* and usages; * * * otherwise third persons sought to be affected thereby will not be concluded. *Index animi verbo.*

"Reasonable doubt as to the true character of an act will always protect effectually third parties from the operation of the same."

From the foregoing quotation it clearly appears that the real distinction between the contract in question in that case and those examined in cases previously cited is visceral and consists in the difference in the *situs* of the contracts, and the citizenship of the contracting parties. Such a contract as the one treated of in that case does not come within the saving power of Art. ten (10) of the Civil Code, because it was not an act passed in one country or State to have effect in another country or State. But it was a contract between citizens of this State with regard to real property in this State, and couched in the terms of a common law deed of trust. Hence the entire subject-matter of the covenant came under the operation of the laws of this State, and which give no sanction to either trust-deeds or trust-estates.

The conclusion is, therefore, quite clear that, on both reason and authority, there is no incompatibility between the principle announced in Thibodaux vs. Anderson and that announced in Miller vs. Shotwell, and previous cases.

Giving to the Michigan contract the legal effect it was, by the parties, intended to have, in this State, where it was by them intended to operate, and the conclusion is irresistible to the effect that, operating *as* a mortgage under our law, its timely and proper inscription affected *third* persons and creditors of the grantor and mortgagor in this State, just as completely as if same had been couched in the form prescribed by our law. And this principle is distinctly announced in Bowman vs. McElroy.

Giving to the Michigan contract effect *as* a mortgage in this State, two consequences necessarily follow, to-wit:

First—That, it having been duly inscribed on the book of mortgages in the parish where the property is situated prior to the attachment of Gaither, it primed the privilege he acquired by his seizure.

Second—That it being a mortgage evidenced by contract, it must be given effect as a conventional mortgage under our law.

Giving to it the effect of a conventional mortgage under our law, and the amount it was given to secure being $7000 with interest, the price of sale under *fi. fa.* issued under Gaither's judgment was insufficient to cover it, and the adjudication is necessarily void *ab initio*, and conveyed no title to the purchaser. C. P. 684.

The general rule formulated under that article is, that property

specially mortgaged can not be sold at the suit of a third party unless the price bid exceed the amount of such special mortgages. For if there be no surplus of proceeds after the payment of the mortgage there is no price, and the adjudication would have no consideration. Bacas vs. Hernandez, 31 An. 87; Dunning vs. Coleman, 28 An. 48; Hills vs. Jacobs, 7 R. 406.

II.

In view of the opinion we entertain of the Michigan contract, the plaintiff is undoubtedly entitled to its enforcement against the one-fourth interest in the Criton plantation which Caskey acquired from Washington, and subsequently attached by Gaither. Consequently, plaintiff is entitled to personal judgment against the defendant, Caskey—he having personally appeared in the court below and answered, submitting himself to the jurisdiction of the court—for the sum of $7000, with recognition of lien and mortgage on the property described, to take date from the 10th of March, 1891, the date of recordation.

III.

With regard to the nullity of the judgment in the partition suit we are fully satisfied.

The averment of the petition is, that the suit was instituted by Washington against Gaither and petitioner—the latter being a citizen of the State of Michigan—and that no curator *ad hoc* was appointed to represent him as an absent defendant—the clerk of court having appointed an alleged curator without affidavit being made of the absence of the judge of the District Court from the parish at the time; and the record of said partition suit disclosing that the curator thus appointed neither accepted the appointment or acted under it by filing an answer, or otherwise.

The theory of plaintiff's counsel is that in such case the appointment of a curator *ad hoc* is jurisdictional; and we have so held in many cases. It is manifestly a *sine qua non*. Butler vs. Washington, 45 An. 279, and Young vs. Upshur, 42 An. 362.

The only means of subjecting the property to the power and jurisdiction of the court, is by citing the plaintiff as an absentee by means of a curator *ad hoc*.

The petition bears this endorsement, to-wit:

"The foregoing petition considered, it is ordered that John Dale

be appointed curator to represent the interest of Samuel G. N. Gates. This signed in chambers, 13th January, 1892.

"W. H. SHIELDS,
"*Clerk of said Court.*"

This order is not preceded by any affidavit.

The Constitution confers upon the General Assembly the power "to vest in clerks of court authority to grant such orders and do such acts as may be deemed necessary for the furtherance of the administration of justice;" and it further declares that "in all cases powers thus vested shall be specified and determined." Constitution, Art. 122.

In pursuance of this constitutional authority, the General Assembly enacted a statute which provides that "in the absence of the judge from the parish, or in case of his resignation, they (clerks of District Courts) shall have power to allow interventions, grant orders o third opposition * * * appoint special tutors, or tutors *ad hoc* to minors, appoint curators and curators *ad hoc*, appoint advocates to absentees." Sec. 4 of Act 43 of 1882.

And this statute further provides that "in all cases in which the clerk is empowered by this act to grant orders in the absence of the judge from the parish, or in case of his recusation, *the oath of the party*, or of his attorney, that the judge is absent from the parish or being recused, he is unable to give the order, *must be annexed to the petition or application.*" *Id.*, Sec. 6.

The power thus vested by the Legislature in the clerks of court is particularly specified, and the *mode* of its exercise is also specified in mandatory terms, and same can not be exercised in any other manner.

There is no room for construction. The statute is plain. The requirement of the law directing the appointment of curator *ad hoc* to absentees is jurisdictional, and the manner of its observance is a rule of property.

In the case of Washington vs. Gaither there is not the least appearance of this statute having been complied with, and the result is the absolute nullity of the judgment pronounced, in so far as the present plaintiff's rights are concerned, and it is our province and duty to thus declare it.

The judgment appealed from is erroneous and must be reversed.

It is therefore ordered, adjudged and decreed that the judgment

appealed from be annulled and reversed; and it is further ordered, adjudged and decreed that there be judgment in favor of the plaintiff (1) annulling the judicial sale of the one-fourth interest of Joseph G. Caskey in the Criton plantation, which he purchased from John Washington; (2) that he have and recover of and from the defendant Caskey the sum of $7000, with recognition of his lien and mortgage, taking date from the date of its registry, March 15, 1891; (3) annulling the judgment rendered in the partition suit of Washington vs. Gaither.

It is finally ordered and decreed that the defendant and appellee, Gaither, be taxed with the costs of both courts.

No. 11,441.

STATE OF LOUISIANA vs. D. K. BINGHAM.

If the defendant is made aware, previous to trial, of the necessity of employing counsel to defend his case, and neglects to make such employment and declines to accept the services of counsel whose services are placed at his command, it is his own fault if he proceeds to trial without requiring service of a copy o the jury list and the information as the law requires; and if illegal or incompetent evidence is admitted against him without objection, he is to blame.

APPEAL from the Seventh District Court, Parish of East Carroll. *Montgomery, J.*

M. J. Cunningham Attorney General, *Jos. E. Ransdell,* District Attorney, for the State:

1. The evidence shows the defendant was an unusually intelligent negro; that his brother had employed counsel to defend him.
2. The law does not require service of the venire on an accused who elects to be tried by the judge.
3. An objection of failure to serve such venire made after trial and conviction, comes too late. State vs. Price, 6 An. 691; State vs. Benjamin, 7 An. 47; State vs. Shay, 30 An. 114; 1 Bishop Cr. Pr., 126.

Robt. Whetstone Attorney for Defendant and Appellant:

1. Every person indicted for any crime, capital or punishable with imprisonment at hard labor for even years or more, shall have a copy of the indictment and the list of the jury which are to pass on his trial delivered to him at least two entire days before trial; he shall be allowed to make his full defence by counsel learned in the law; the judge of the court before whom he is to be tried shall immediately, upon his request, assign to him such counsel as he shall desire. Rev. Stat., Sec. 992; 28 An. 631; 33 An. 679; 34 An. 1037; 43 An. 895.

The opinion of the court was delivered by

WATKINS, J. The defendant was tried for and convicted of the crime of forgery, and was sentenced to imprisonment in the State penitentiary for a term of five years; from the judgment and sentence he has appealed, relying on a motion for a new trial which he insists was improperly overruled.

The grounds assigned in the motion are: (1) That the judgment and sentence pronounced are contrary to the law and evidence; (2) that he has no knowledge of law, is poor and without means to employ counsel to defend his case; (3) that he was not advised by the court of his right or privilege, under the law, to have counsel assigned to him, whose duty it was to assist him in making his defence; and that, consequently, his case was tried *ex parte* and illegal evidence adduced against him, to which he did not have the privilege of objecting, or of offering evidence in rebuttal; (4) that there was no copy of the *venire* or indictment served upon him, as the law directs; (5) that through ignorance of his rights he elected to be tried by the court, when, in fact, he should have been tried by a jury.

On the trial of the motion both parties introduced witnesses, and from their testimony, which was taken in writing and is incorporated in the transcript, we find the following substantial facts, to-wit:

That the District Judge did not appoint or assign the defendant counsel because he was an unusually intelligent colored man, and the court presumed he knew whether or not he was entitled to a lawyer to defend his case; and that he made no request of the court to appoint one.

That the defendant denies the possession of means sufficient to employ counsel, and disavows knowledge of his right to have counsel appointed to assist him.

That since last June he has been constantly incarcerated in the parish jail, and was coerced to trial without legal advice, and without having been served with a copy of the jury list of any kind.

That since his trial and conviction, he did not employ the attorney who prepared the motion for a new trial and assisted in the trial of it.

Per contra, that one of the practising attorneys at the bar of the court of trial, at the request of defendant's brother, called to see the defendant professionally in reference to the case; and that his

services were engaged by him (the defendant's brother) to defend the accused. But that during the course of their interview, the defendant signified that he had perfect confidence in his own ability to defend himself, and he thereupon withdrew from the case.

That this interview occurred only a few minutes before the case was called for trial.

These statements, taken as a whole, seem to disclose, on the part of the accused, a full knowledge of his right to have counsel to represent him, and hence the duty was imposed upon him to have made a request of the judge for the assignment of counsel to defend him. This is the plain precept of the law. State vs. Doyle, 36 An. 91; R. S., Sec. 992.

If incompetent and illegal evidence was adduced against him on the trial; if no copy of the information and the jury list were served upon him, it was evidently because he did not have timely and competent legal advice; but it was just as evidently the fault of the defendant that he declined to accept the services of the attorney his brother had selected for him, and risked his defence on his own ability.

That his action was intelligent and thoroughly understood, is attested by the fact that the interview he had with the counsel his brother employed for him, occurred on the same day his trial took place.

Under these circumstances it would be to award a premium upon negligence, to reverse the judgment and grant the defendant a new trial.

Judgment affirmed.

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No. 11,431.

Succession of Jumonville Morvant.

1. Where, after a succession has been placed under a regular administration an, olographic will of the deceased is found bequeathing the usufruct of certain specific property to a particular person, and this will is, at the instance of the legatee, offered for probate by an attorney at law and probated over the opposition of the heirs and the administrator, remuneration for such services must be sought not from the succession, but the particular legatee.
2. To sustain a claim made by the mistress of a man that she is entitled to one-half of all the property left by him at his decease, on the ground that it was the result of their joint thrift and industry and economy, where there is no evidence to show that she furnished a cent for the purchase of the property,

but, on the contrary, occupied toward him the relation of his servant, would be to place the mistress substantially on the footing of a wife. Such a claim is sustainable neither by law nor by morals.

Held on contest upon the will—

1. That it was throughout a bequest in usufruct for life.
2. That it was a special legacy of specifically described objects and not a universal legacy or a legacy under a universal title.
3. That the objects bequeathed were those in existence at the date of the will and not at the date of the death of the testator.
4. That the executor, being charged with the duty of seeing that the proper security should be given by the usufructuaries under the law, is entitled to commissions upon the appraised value of the property so bequeathed.

APPEAL from the Eighteenth District Court, Parish of Lafourche. *Guion, J.*, in place of *Caillouet, J.*, recused.

Thomas A. Badeaux and *Arthur F. Knobloch* Attorneys for Executor, Appellant:

1. The judgment of the lower court should be amended so as to restore fees of counsel and executor's commission as fixed in the account of executorship; that the land shall be given to Frank Reese in usufruct, during life, on his furnishing security required by law.
2. A legacy of certain specific and designated objects is a special legacy and not a universal legacy, or legacy under a universal title.
3. A legacy of designated objects to A and B, for "*longs they live*" and for "*they life times*" does not transfer the objects in full ownership and can only be interpreted as the constitution of an usufruct for life.
4. In the interpretation of a will, the intention of the testator must govern, and to arrive at the intention effect must be given to every clause and every expression in the will. Qualifying words used by the testator to restrict the extent of the legacy can not be disregarded.
5. A special legatee has no concern to question any item in the executor's account which is not covered by the terms of his legacy, and when his legacy is paid him in full.
6. A concubine, whose status is fixed by a judgment in a suit wherein she was plaintiff and the succession of the deceased was defendant, can not be heard to claim anything from the succession in addition to what is allowed her in the judgment, which has become final.

Beattie & Beattie Attorneys for Frank Reese, Opponent and Appellant:

1. In the interpretation of wills the intention of the testator is the guiding star, and in case of doubtful expressions a meaning must be given to them that it is likely the testator meant to give, considering his habits and his education. 35 An. 718, Duranton, Liv. III, Tit. II, Chap. V, Sec. XI, 361; 35 An. 1056, Touillier V, Sec. 862; Id., Vol. VI, Sec. 310.

2. A will of movables operates as if written at the moment of the death of the testator. It operates upon all of the property then owned by him. 35 An. 718; Lovelace on Wills, Part II, Chap. 1, 19; Touillier V, Sec. 362.
3. In the interpretation of wills a court may supply words, and *a fortiori* it may punctuate in accordance with the rules of the English language. 8 An. 254.
4. Article 480, C. C., does not govern the case at bar, the articles given being in a different house from the one given.
5. If, in a conjoint legacy to two, one of the legatees is incapable of receiving, the whole goes to the other by accretion. C. C. 1707, 1708.
6. Attorneys' fees for filing application for administration, and especially if there is a will, must be paid by the applicant and not by the estate. 10 R. 541.
7. An administrator who turns over all of his duties as administrator to his attorney must pay the fees of his attorney himself. 8 An. 517.
8. An attorney will be allowed nothing from the estate when his services were not beneficial to it and when advice given by him was of such a character as to cause great trouble and costs to the estate.
9. An administrator or executor guilty of acts of spoliation toward the estate, and so remiss and unfaithful in his duty as to cause great trouble and extra costs, is not worthy of his commissions.

Clay Knobloch & Son Attorneys for Harriet Reese, Opponent and Appellant:

A concubine who receives from her paramour a donation *inter vivos* which, under Art. 1481, C. C., is reduced to one-tenth of the estate, is not estopped from claiming as a copartner and in her own right one-half of the property of the paramour, when she alleges that concubinage was a mere incident of the relations that *ab initio* were those of master and servant, and when she further alleges that her joint labor, industry and economy contributed to accumulate and save such property. 8 M. 11; 7 An. 152; 25 An. 448; 44 An. 61.

John S. Billieu Attorney for Pauline Hébert, wife of decedent and dative tutrix of the minor Germaine Morvant, Opponent and Appellee:

1. The intent of the testator must appear from the will itself and the instrument is to be construed as a whole.
2. Though written by an unlettered man, and whilst therefore not according to the rules of grammar, the intent is clear.

The opinion of the court was delivered by

NICHOLLS, C. J. Jumonville Morvant died in the parish of Lafourche on June 2, 1890, leaving neither ascendants nor descendants, but collateral relations. On the 6th June, 1890, Sylvere Morvant, a brother of the deceased, applied to be appointed administrator of the succession. An inventory was taken, and, after the usual

delays and notices, Sylvere Morvant qualified as administrator. On the 7th October, 1890, one Harriet Reese filed a suit against the succession represented by the administrator, claiming two one-thousand dollar bills which had been inventoried as part of the assets of the succession as her own property by title of manual gift made to her by the deceased. Answer was filed in the suit, and upon the issue therein made the case was tried and resulted in a judgment on the 7th April, 1891, decreeing that Harriet Reese having been the concubine of the deceased could recover but one-tenth part of the succession after the payment of all just and legal charges. This judgment was not appealed from and became final.

In the suit of Harriet Reese vs. The Succession of Morvant, a document which was afterward probated as a will was filed, the filing bearing date 25th February, 1891, and it remained on file in that suit until the 8th of October, when, at the instance of one Frank Reese, represented by Messrs. Beattie & Beattie, attorneys at law, it was offered for probate as the last will of Jumonville Morvant.

On the 31st October, 1891, Sylvere Morvant and his brothers and sisters filed their opposition to the probate of this document and the prayer for the executorship, claiming that it was not a will, but asking, if the court should so declare it to be, that Sylvere Morvant be appointed executor.

The District Court on the 12th December, 1892, held the document to be a will, leaving the question of the executorship to be determined subsequently. On appeal to this court this judgment was affirmed. Succession of Morvant, 45 An. 207. In the subsequent contest for the executorship, Sylvere Morvant was appointed and qualified as such on the 17th June, 1893.

The instrument probated as the will was as follows:

"September 14th 1878.

"Brother and Sister i Give my piec of Lands What i Bout from Miss C M Gillis To Harriet Reese and Frank the boy what i rase and also my buggay and all my Cow and my oxson and the Cart also dollar My Mare and oll What i got in the house i give all that To Harriet Reese and Frank Longs they live Brother and sister i give that to Harriet Reese and Frank for they Life times So no Law got anythings to do With What i give her and Frank i give it to her with all my heart She has been with me 24 years Well my Brother and Sister

i sine my manes on this piec paper for you all to see that i Right dis myself.

"J. Morvant

"J. Morvant

"J F Morvant

"Brother Joahim you will get all my money that Mr. H W tabor got for me and you will give it to harriet Rees he got 2 noat for me."

The executor filed his final account of executorship and tableau of distribution on the 8th of December, 1893. To this account Messrs. Beattie & Beattie, Frank Reese, Harriet Reese, and the tutrix of Germaine Morvant, one of the minor heirs, filed oppositions.

On the trial of the case the executor filed pleas of estoppel and *res judicata* to the opposition of Harriet Reese.

In this account or tableau the executor makes the statement that, by the last will of the deceased, Frank Reese and Harriet Reese were given the usufruct for life of—first, the real estate described under the item 1 of the inventories, valued at $700; second, the horned cattle or their value, described under Nos. 5, 6, 7, 8 and 9 of the inventories, aggregating a value of $79; third, the movables, the No. 10 (one gun and one hunting bag), valued at $30, but that the buggy referred to in the will is no longer in existence and the mare, "Dollar," died long since.

He declares that, in his opinion, the rights of Harriet Reese were fixed by the judgment rendered in her suit against the succession, and that she can not claim the rights fixed by that judgment and also the usufruct bequeathed her; that, therefore, he proposed to deliver to Frank Reese, upon his furnishing security as usufructuary and otherwise complying with the law, the aforementioned property still in existence, to be enjoyed by him in usufruct according to the terms of the will.

The account showed certain movables and a balance in cash still in the hands of the executor, which he proposed to distribute among the legal heirs of Morvant.

In the opposition filed by Messrs. Beattie & Beattie they claimed as being due them as privileged creditors of the succession the sum of five hundred and five dollars for their services as attorneys at law. They allege that knowledge of the existence of the paper afterward probated as a will was brought home to Sylvere Morvant,

then acting as administrator of the succession, as far back as 25th February, 1891, by the filing of the same in the suit of Harriet Reese. That in spite of this knowledge he failed and refused to open the succession and probate the instrument, but continued to intermeddle in the succession and retain its funds without any authority or legal right and without rendering any account. That on the 8th October, 1892, they were employed by Frank Reese to open the estate and to probate the will; that they filed a petition for that purpose in the name of the said Reese, who was a legatee under the will, and asking for letters of executorship; that this application was opposed by the administrator and all the heirs at law of the deceased. That the litigation ended in the probating of the paper as a will by the District Court and in the affirmance of the action of that court on appeal to the Supreme Court. That in this litigation they and opponent Reese acted for the best interest of the whole estate, legatees and creditors.

Frank Reese claimed in his opposition that by the last will of the deceased he was made his sole universal legatee. He opposed generally each and every item of the account, and certain items thereon particularly mentioned. He prayed that he be declared the sole universal legatee and placed in possession of the estate, and that he recover judgment against the accountant for thirteen thousand one hundred and seventy-five dollars.

Harriet Reese in her opposition declared that she was entitled to one-tenth of the whole succession by virtue of her judgment, in the suit already referred to, asserting that said one-tenth had been adjudged to her under a manual donation *inter vivos* made to her by Jumonville Morvant. She claimed that she was, moreover, entitled to one-half of the remainder of the succession for the reason that for forty years next preceding and up to the death of the said Morvant he and she had lived continuously and uninterruptedly as man and wife, but that their relations *ab initio* were those of employer and servant—opponent being his servant; that at the time their relations as such began, and for years thereafter, Morvant was a poor man, not owning any property whatever; that opponent attended to all his household affairs, keeping house for him, raising and selling poultry, raising cows, caring for them, selling eggs and milk, doing all his housework, as cook and washerwoman, caring for and saving up the money made by them in their joint industry, economizing in every possible way the same as a good and dutiful wife

would have done, and demeaning herself toward him as faithfully as if she had been his lawful spouse, taking care of all his clothing, mending and buying same for him; and she avers that by reason of all that is aforesaid, and by her thrift, economy, joint labor and industry during said forty years, she enabled him to acquire, accumulate and have all the property that is inventoried in the matter of his succession, and is therefore entitled to one-half of all the said property after deducting the one-tenth thereof for the aforesaid donation made to her *inter vivos*. In addition to this claim she opposed the account on grounds which it is unnecessary to particularize in view of the conclusions we have reached in the case.

The district judge recognized Frank Reese as the owner in full ownership of the real estate referred to in the will and ordered him to be placed in possession thereof. It recognized him to be entitled to hold in usufruct certain movables mentioned, and ordered that he be placed in possession as usufructuary on giving security as such according to law. It rejected the claim of Harriet Reese in so far as she set up a claim to be entitled to one-half of the property of the succession, in addition to the one-tenth of the estate adjudged her under the donation of the two promissory notes.

It ordered the executor to account for $175 for the stallion Grandy, and rejected his claim for commissions on the property declared to have been bequeathed to Frank Reese. It reduced the fee of L. P. Caillouet, attorney at law, to $200, and that of Messrs. Badeaux and A. F. Knobloch to $250; also reduced to $10 the fee of Coulon, notary, and such changes having been made and ordered to be made, it homologated the executor's account.

Messrs. Beattie & Beattie, Harriet Reese, Frank Reese, Sylvere Morvant, the executor, and Mrs. Pauline Hebert, tutrix, appealed.

We think the action of the lower court in rejecting the opposition of Messrs. Beattie & Beattie was correct. Morvant appointed no executor in his will, which was limited in its dispositions to a special legacy of specific property. The existence of the paper afterward probated as such will was unknown to his legal heirs at the date of his death, and his succession was regularly opened and placed under administration with an administrator as its legal representative. Opponents claim that their services in subsequently, at the request of Frank Reese, propounding the will for probate and doing so successfully against the opposition of the heirs and administrator

enured to the benefit of all parties concerned. It is a mistake to suppose that should a succession have been either entirely or partially settled under the administration of an administrator, that all acts done under such administration would necessarily be invalidated by the production of a will in which the testator should have specially bequeathed particular property. (Dwight vs. Simon, 4 An. 493.) No person other than the particular legatee would have an interest in the probating of the will, and his only interest would be to receive the legacy. If the legacy should in point of fact be received it would be a matter of indifference to him whether it should have been delivered by an executor, an administrator, or by heirs in possession. It is not essentially necessary that an executor should be the representative of a succession in all cases where the deceased may have left a will, although, where that fact is known, such would be the character of the legal representative. The office of executor is but ancillary to the great object of settling and distributing the estate. Nicholson vs. Ogden, 6 An. 486. In this particular case the probating of the will was solely and exclusively in the interest of the special legatee and to him his clients must look, as the court below declared. Roselius vs. Delachaise, 5 An. 481; Michon vs. Gravier, 11 An. 598; Wailes vs. Succession of Brown, 27 An. 412.

The rejection by the court of the opposition of Harriet Reese, claiming one-half of the property of the succession, in addition to the rights adjudged to her under the donation of the two notes mentioned, was also correct. She alleges that she was the servant of Morvant. She never ceased to be such. If anything be due to or belong to her, it is not "property" based upon the grounds set up, but "money" as "wages" for services rendered. If the claim asserted by the opponent were maintained, it would place the concubine of a person upon the same line and footing as a wife. Such a proposition can not for an instant stand the test of either law or morals.

The cases of Delaman vs. Roger, 7 An. 152, and Malady vs. Malady, 25 An. 450, relied on by the opponent, were decided upon their own special state of facts and not upon the theory of a *quasi* community of acquets and gains between a man and his mistress, on which theory the present claim must rest, if at all. In the cases cited the rights of the women were predicated on the fact that they had actually furnished the money with which the property was purchased.

In the first case the court said: "The reasonable effect of Art. 2804 of the Civil Code is to render the participator in concubinage incapable of recovering as a universal partner one-half of the property acquired, although her labor may have contributed nothing toward its accumulation; but when her capital and labor have contributed a full share toward the result, equity entitles her to half the property acquired."

Art. 2804 of the former is Art. 2833 of the present Civil Code, and is as follows:

"Universal partnership shall only be contracted between persons who are not respectively incapacitated by law from conveying to or receiving from each other to the injury of others."

There is not a word in the record going to show that the deceased ever received a dollar from the opponent, or that a cent of her money was ever employed in the acquisition of any property, whilst it does appear that in the settlement of the estate she will, under the donation made to her, receive in money an amount equal to one-tenth of the value of the whole succession.

This opponent made special objections to the account filed by the administrator. Some of these objections were to the effect that the administrator had failed to charge himself with various amounts which should have been placed to the credit of the succession; others, that certain charges presented as claims against the succession were excessive. As a general rule, one neither an heir nor a creditor of a succession has no right to interfere in its administration, but under the exceptional facts and circumstances of this case Harriet Reese, though holder and owner of two notes against third persons, became entitled to examine and question the account of the administrator, in so far as it would tend as rendered to throw the tenth of the value of the estate illegally and improperly below the amount of the two notes donated to her. The parties whose claims were reduced upon these oppositions, and those of Frank Reese, have not appealed. The administrator is not authorized to appear before us in their behalf, and the judgment as to those parties must remain untouched. There has been a misapprehension, we think, in respect to the position and rights of Harriet Reese, and in the scope of the judgment which was rendered in the suit which she instituted to have herself recognized as owner of the two notes referred to.

Her rights as donee of those two notes were entirely separate and distinct from those as a legatee under the will. When upon her claiming ownership of the notes the defence was set up that she had been the concubine of the deceased, and therefore could not, under Art. 1481 of the Civil Code, take by donation to an amount exceeding one-tenth of the value of the whole estate, the court maintained the defence and limited her rights to one-tenth under the article cited, it, at the same time, to that extent recognized the donation in substance, though not in form. The judgment did not change the character of her title. She did not become through the judgment the holder of a general claim against the succession for one-tenth of its entire value, whatever it might be, but remained the owner of a special claim under the donation, which, *under no circumstances, was to exceed $2000*, but which was subject to be reduced below that sum, if necessary, to such an amount as would make the donation conform to the law. Her *status* as donee and legatee were not merged together under and through the judgment. The effect of this misapprehension has been, we think, to cause the opponent to make no claim as a legatee under the will, either in this court or the court below.

The next opposition in its order in the record is that of Frank Reese. In reference to this the district judge said: "The first question to be disposed of is how should the will of Jumonville Morvant be construed and interpreted. In other words, what did he dispose of—to whom and by what kind of title? The executor contends that by his will Morvant left only the usufruct to Frank Reese of the real estate which is described in the inventory, and the usufruct of the horned cattle, gun and hunting bag, which are also inventoried. He claims, on the other hand, that all of the property described in the will and left by the testator at his death was given to him in full ownership and not as usufructuary. By his will the testator constituted Harriet Reese and Frank Reese his legatees, but as the former was his concubine and could not receive anything from the estate beyond the tenth part provided for by Article 1481, the latter became his sole legatee by right of accretion under Article 1707, C. C. What then did he leave to Frank Reese? * * * I think it plain that he intended to give to his legatees in full ownership the land which he bought from Mrs. C. M. Gillis—the same which is described under No. 1 of the inventory, and that he gave to them the

remainder of the property disposed of by him. The question now to be determined is: Did he leave to them the usufruct of only such property mentioned in the will as he owned on the 14th September, 1878, the day the will was made, or was it his intention to give the usufruct of such property of the same kind as he might leave at his death? In my opinion the objects described in the will are particular legacies and Frank Reese is a particular legatee. He does not constitute him either a universal legatee nor a legatee under universal title, for he does not give to one or several persons the whole of the property which he leaves at his decease, as provided by Article 1606 of the Civil Code, nor a certain proportion of the effects of which the law permits him to dispose, as a half, a third, or all his immovables, or all his movables, or a fixed proportion of all his immovables or of all his movables, as provided by Article 1612 of the Civil Code. The testator designated particularly the property he desired to dispose of in full ownership, as well as that which he proposed to give the usufruct of. In my opinion it can not be successfully contended that objects of the same kind as those specially disposed of on the 14th September, 1878, were intended to be included in the legacy, and my view of the case and of the law on the subject is that only such objects as were in existence on the day the will was made were intended to be covered by the clause therein giving the righ of usufruct to his legatees.

"Marcadé says: 'Ainsi celui qui legue tous ses immeubles mais comme biens speciaux determinés et non en masse; celui qui legue même en masse et dans leur ensemble toutes ses maisons—tous ses bois—tous ses immeubles des colonies ou de tel departement et qui exclut ainsi ses autres immeubles de la disposition ne fait que des legs particuliers. Il en sera ainsi encore de toutes dispositions d'usufruct si éxtendu que cet usufruct puisse être.' Vol. 4, p. 101 (Art. 1010, C. N.); same volume, p. 117 (C. N. 1019); Succession of Dougart, 30 An. 272.

"It is clear to my mind that the testator intended to leave the usufruct of the buggy which he then had, and which the evidence shows was not on hand at the time he died. It is not necessary to discuss what cows he intended to dispose of in usufruct, since the executor has proposed to turn over the horned cattle left at the death of the testator. The evidence shows that at that time there were no longer any oxen, also that the mare 'Dollar' had died,

and that the cart spoken of consisted of only an axle, a hub and some ties, of little or no value as a cart. I am of the opinion that the language of the testator in leaving the usufruct to his legatees of 'all what I got in the house' can not be interpreted to mean a disposal in usufruct of all that he might have in his house at his death, but only of such as he had at the date of his will. His will designated and meant to designate such objects legally included within the meaning of his language as he owned at the time, for he speaks of the present, and not of what he might have at his death. I am borne out in my interpretation by the rule laid down in Arts. 1720 and 1722 of the Civil Code, and by the decisions of the Supreme Court in the Succession of Valentine, 12 An. 286, and Lawson vs. Lawson, 12 An. 603. Counsel contends that all the property owned by the deceased at the date of his death was transferred to him, and not such only as he had on the 14th of September, 1878, the day the will was made, and rely upon the Succession of Burnside, 35 An. 719, and Succession of Marks, 35 An. 1055. It will be noticed that in both of those cases the legatee was an universal legatee and not a particular legatee of certain designated property, as in the instant case. * * * So far as Frank Reese is concerned, I have reached the conclusion that he is entitled in full ownership to the land described under No. 1 of the inventory, and that he is entitled to the usufruct of the cows and other horned cattle, as well as the gun and hunting bag, and the axles, ties and hub of an old ox cart, all of which are described under No. 5 to No. 10, inclusive, and No. 12 of the inventory, on his giving security as usufructuary."

The judgment of the court as to Frank Reese conformed to the views expressed by the judge in his opinion. The conclusions reached by the District Court were correct, except that relative to the disposition made by the testator of the land mentioned in the will and described under No. 1 of the inventory. We are of the opinion that the testamentary disposition made of that land in the will was of the usufruct thereof during lifetime, and not of the full ownership of the property. Counsel of the executor in their brief say: "The articles intended to be bequeathed are enumerated by this illiterate man in his own inartistic and clumsy manner, but in such a way that his meaning is obvious. No period can be supplied, without doing violence to the sense, after the words 'the boy what I rase,'

and yet without putting a full stop at this part of the sentence it can not be said that the will gives the land in full ownership to Frank Reese. The sentence in its natural order comes to a stop after the words 'longs they live.' A new sentence begins with the words brother and sister, which follow. Full and complete sense is made by adopting this interpretation of the will. If a period is placed after the words 'the boy what I rase' we will have to make the following sentence begin with the words 'and also my buggy,' etc., which is not permissible according to plain rules of punctuation. We contend that the only natural construction to give to the words of the will in which they refer to legacies is to treat the land, the buggy, the cows, the oxen, the cart and the mare 'Dollar' as forming but one continuous enumeration, all qualified by the expression 'longs they live,' and by adopting this interpretation we come irresistibly to the conclusion that the land as well as the movables was intended to be given in usufruct. We are strengthened in the contention that we make by the very next sentence in the will, which by the terms used emphasizes the intention of giving the land in usufruct. It says: 'i give that to Harriet Reese and Frank for they life times, so no law got anything to do with what I give her and Frank.' The word 'that' used in the second clause refers evidently and can not refer to anything else than the whole enumeration of objects contained in the first sentence, including, of course, the land. If it had been the desire of the testator to exclude the land from the usufruct that he was constituting, it is certain he would have used words to indicate his meaning. It would have been easy for him to say, for instance, 'I give the piece of land that I bought from Miss Gillis, to Frank and Harriet.' Had he stopped there, his meaning would have been that he gave the land in ownership to these beneficiaries of his bounty, but the fact that he goes on and says that he gives *also* the buggy, etc., to these persons for as long as they live, and that he further indicates his intention of establishing a usufruct in their favor by saying that he gave them 'that' for their lifetime, points to the conclusion that he meant to give everything mentioned specifically in the will in usufruct and not otherwise." Counsel refer us to the frequent use of the words "brother and sister" in the will as significant; they say that by adopting the interpretation that the land and movables were to be given in usufruct only "there was a reason why the testator desired

to address his collateral kindred. He recognized that under the law all his property would belong to his blood relations and he did not wish to deprive them of their inheritance. At the same time, he wished to impress upon his heirs that while he gave them everything else that was not enumerated in the will, that even those designated objects would be theirs ultimately, but he wished that Frank and Harriet Reese should not be disturbed in the use of the land and movables as long as they lived." We think counsel have taken a correct view of the intention of the testator as expressed in his will.

Holding, as we do, that Frank Reese was a special legatee of particular objects, the opposition filed by him wherein he seeks to charge the executor with an increase in the credit items of the account require no attention at our hands and this is conceded by his counsel.

In deciding that only the usufruct of the land mentioned in the will was conveyed by the will, we throw the constructive possession at least, and the responsibility for that property for the time being, upon the executor, whose duty it will be to see that proper security be given by the usufructuary in the premises. Being thus responsible for it, he is entitled to have the same included in the property upon which his commission is based. With the exceptions mentioned, we think the judgment appealed from is correct.

For the reasons assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be amended in so far as it adjudged and decreed and recognized Frank Reese to be the owner in full ownership of the real estate bequeathed to him by Jumonville Morvant and described under No. 1 of the inventory in his succession, and that he be ordered to be placed in possession thereof by the executor, Sylvere Morvant, and it is now ordered, adjudged and decreed that Frank Reese be and he is hereby recognized as usufructuary during his life under the will of Jumonville Morvant of the real estate mentioned in said will and described under No. 1 of the inventory of his succession, and that he be placed in possession thereof by the executor on his giving security according to law.

And it is further ordered, adjudged and decreed that the judgment appealed from be amended in so far as it rejects the claim of the executor to be paid a commission of two and a half per cent. on seven hundred dollars, the inventoried and appraised value of the real estate recognized in the judgment to be the property of Frank Reese,

and it is now ordered, adjudged and decreed that the claim of the executor to be paid a commission of two and a half per cent. on the appraised value of the property mentioned in the will and described under the No. 1 of the inventory be recognized as just and the same is maintained. As so amended, the judgment appealed from is affirmed and the case is remanded for further proceeding according to law, costs of appeal to be paid by Messrs. Beattie & Beattie, Harriet Reese, Frank Reese and Mrs. Pauline Hebert, tutrix.

No. 11,458.

E. O. STANARD MILLING CO. vs. WILLIAM P. FLOWER.

46 315
123 1077
123 1082

1. The ratification of the act of an agent can not be divided and applied to one part of the act and excluded from the other; it is entire or nothing.
2. An agreement signed by an ostensible purchaser of flour couched in the following language:

"Bought of E. O. Standard Milling Company 3000 barrels of Eagle Steam flour at $3.85 f. o. b. St. Louis, for shipment at my option during month of March, 1893. It is further agreed and understood that if I do not want to receive the flour in March, settlement may be made as follows, viz.: E. O. Stanard Milling Company paying me any difference there may be if an advance in value or my paying E. O. Stanard Milling Company the difference between the purchase price and the market price at the time of settlement, provided the value then is less than the purchase price. Settling prices to be based on St. Louis Merchants Exchange quotations on extra fancy flour at date of settlement," held to be void as coming within the provisions of Art. 2983 of the Civil Code relative to gaming.

APPEAL from the Tenth District Court, Parish of Rapides.
Coco, J.

Robert P. Hunter Attorney for Plaintiff and Appellant:

In a future contract relating to the sale of flour, if the party seeking to enforce the contract was ready to make an actual delivery of the flour, and if as to such party the contract so contemplated, it can be enforced at law, and is not reprobated as a wagering contract. Conner & Hare vs. Robinson, 37 An. 814; Gruner & Co. vs. Stucken, 39 An. 1076.

John C. Ryan and *J. R. Thornton* Attorneys for Defendant and Appellee:

Sales of property for future delivery, with the *bona fide* intention and obligation to make actual delivery, are lawful contracts; but if, under the form of such a contract, the real intent be merely to speculate on the rise or fall of prices, and the goods are not to be delivered, but the contract is to be settled on the basis of differences of price, the transaction is a wager and is non-actionable. Conner & Hare vs. Robinson, 37 An. 814 and 818; American and English Encyclopedia, Vol. 8, pp. 1006, 1007, 1011; Id., Vol. 3, pp. 873, 875.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiffs, a Missouri corporation, seek a judgment against the defendant for $2250 with legal interest from April 1, 1893, under an agreement evidenced by the following instrument:

AGREEMENT.

ST. LOUIS, MO., U. S. A., 10-21, 1892.

Bought of E. O. Stanard Milling Company 3000 barrels of Eagle Steam flour at $3.85 f. o. b. St. Louis, for shipment, at my option, during month of March, 1893. It is further agreed and understood that if I do not want to receive the flour in March, settlement may be made as follows:

E. O. Stanard Milling Company paying me any difference there may be if an advance in value OR my paying E. O. Stanard Milling Company the difference between the purchase price and the market price at the time of settlement; provided, that the value then is less than the purchase price. Settling prices to be based on St. Louis Merchants Exchange quotations on extra fancy flour date of settlement.

(Signed) W. P. FLOWER,
per J. G. WHITE.

Plaintiffs allege that they have at all times been ready and willing to comply and have complied with all their obligations under the terms and stipulations of the said agreement, that they manufacture about 2500 barrels of flour daily, and were ready and willing during the month of March, 1893, to ship f. o. b. on the cars at St. Louis the 3000 barrels of flour bought by said William P. Flower, had he so ordered, in accordance with his option as specified in said agreement, which he utterly and entirely failed to do through no fault or neglect of theirs. That not only did he not order the shipment of the flour purchased, but he has failed and refused to comply with the stipulations of the second clause in said agreement by settling the difference between the $3.85 per barrel fixed in the agreement and the price per barrel which said grade of Eagle Steam flour was selling for during the month of March, 1893, at St. Louis, to-wit: $3.10 per barrel, as would be shown by reference to the quotations of the St. Louis Merchants Exchange for extra fancy flour, which is the standard fixed by the said agreement, notwitnstanding amicable demand

was made upon him so to do, but on the contrary, when he was requested to settle the said differences in accordance with the terms of the agreement and the usages and commercial customs relating thereto he refused to settle said differences and announced his intention not to pay the same, thereby voluntarily placing himself in default and relieving and dispensing the plaintiffs with the duty or necessity of giving him any notices or making any further demands upon him; and they expressly deny that under the terms of said agreement they were called upon at any time to give Flower any demand or notices whatever. Plaintiffs aver that the sum claimed is the amount of the difference between the purchase price and the market price of said 3000 barrels of flour at the time specified in the agreement, and that this difference represents the actual loss of profits that they would have made on the said 3000 barrels of flour if the said Flower had complied with the contract and agreement and ordered the said 3000 barrels of flour shipped at any time during the month of March, 1893, and he justly owes them the said amount.

Defendant pleaded first the general issue. Further answering he declared that neither himself nor White, who signed the writing or agreement sued on, are merchants in flour or any other article of merchandise, either by the wholesale or retail. That Moses Bloom, who is and has long been a resident of the parish of Rapides, still is, and has been for the last fifteen years, the agent for the plaintiff, transacting and managing its business in Rapides and other neighboring parishes in the State. That he is well and favorably known in commercial circles and in business as a man of experience, honesty and integrity, and enjoys the confidence of all who knew him.

That a few days before the date of the writing sued on, respondent heard that flour was very low in price, and cheaper than it had been for many years, with every probability of its advancing a few months later on, and that the plaintiffs' agent, Moses Bloom, was selling what was and is known as speculating, wagering or future contracts for it. That he saw the agent, who confirmed this report, and thereupon ordered 3000 barrels of Eagle Steam flour, March futures, on a basis of $3.85 per barrel for that month; that it was distinctly agreed and understood that neither the said flour so ordered nor any part of it was contemplated or intended by either party for real or actual delivery in the month of March, 1893, or at any other time, and that the agreement was to be what is known as a specu-

lating, wagering future contract; that it was further understood that the margins on the said flour was 15 cents per barrel, or $450 on the whole 3000 barrels, and that if this brand and quality of flour should further decline as much as 15 cents per barrel respondent would be notified and called upon by plaintiffs for an additional margin of 15 cents per barrel, and that he would then have the option of keeping the margin good on that basis, otherwise he would lose any and all margins put up, and the whole transaction was to be deemed null and void from that mome t by all parties without further notice or delays. That not only at the time of giving the order but at the time of signing the writing or agreement sued on, it was the distinct understanding and expressed intention of all parties that it was a speculating, wagering a d future contract, and not an actual or real agreement for sale, purchase and delivery of a y flour i March, 1893, or any other time. That the whole matter was from beginning to end negotiated with and the writi g or agreement sued on signed at Alexandria, La., with the said Moses Bloom, who stated at the time of signing that it was well and perfectly understood that it was not a real contract for delivery or sale and purchase of actual flour because it was a notorious fact that that large quantity of flour would overstock the whole parish of Rapides; that it was never the intention of any party that the agreement sued on was to be considered a purchase, sale, transfer or delivery of any flour at any time, but a mere and simple wager on its future price or value in March, 1893.

That if the said writing is susceptible of any other construction or interpretation on its face than that of a speculati g future wagering agreement as to the future price of Eagle Steam flour at the St. Louis Merchants Exchange in March, 1893, then he shows and avers that the same was signed and the whole transaction from beginning to end was made through error and mistake on the part of himself, the said White and the said Moses Bloom. That during his absence and without his knowledge the writing or agreement sued on was signed at Alexandria, La., and forwarded to the plaintiffs by the said Moses Bloom; that on his return to Alexandria on or about the 31st of October, 1892, he was for the first time informed that the agreement had been signed, and at the same time was notified by the Rapides bank that the plaintiffs had drawn two sight drafts on him, each for $450, and exchange thereon, and payment thereof was demanded.

That one of the said drafts was drawn and dated on October 24,

1892, and the other October 27, 1892. That he forthwith, on the 31st October, 1892, notified the plaintiff that he refused to honor the said drafts, and that he declined to consummate and execute the agreement by putting up the first or any subsequent margin and to consider the whole transaction at an end and off. Respondent specially denied that any demand was made on him for the amount sued for, or that any notice or statement was sent him, or any notice for him to pay for and receive the said flour, or that plaintiff was ready and willing to deliver any flour at any time before the filing of this suit; thus showing that it knew and understood the agreement sued on to be nothing more than a speculating wagering agreement as to the price and value of Eagle Steam flour at the St. Louis Merchants Exchange, March, 1893.

On the trial of the case the court rendered judgment rejecting plaintiff's demand, and it has appealed.

There can be no doubt that the contract as made between Bloom and Flower was what is known as a future contract. In his testimony the former admits that fact. He said: "I am an old resident of this town and parish. This whole transaction was negotiated through me here in Alexandria. When this flour was ordered it was understood that it was to be future flour; there was to be no actual delivery in March or at any other time; it was understood that it was a future contract—that no delivery was to be made. The understanding with Mr. Flower was that he was to put up a margin of fifteen cents per barrel and keep his margin good if flour declined. I can't remember whether I told Mr. Flower at the time he gave the order he would be closed out, but it is the custom so far as I know. Mr. Flower was not present when this contract was signed. I remember when Mr. White signed the agreement that he said to me: 'Now, Mr. Bloom, this is a future and not a real contract,' and I replied, 'This was not for actual delivery; that 3000 barrels of flour at one time here would overstock the market, and that if that large quantity of flour were in this town at one time, you couldn't sell it for 25c. per barrel.' It was not the intention of any of the parties that this should be actual flour—by any of the parties I mean myself, J. G. White or W. P. Flower. About the same time of this transaction, I made similar contracts for the delivery of flour in March. I sold about 13,000 barrels under similar contracts." Plaintiffs concede that the evidence establishes that the defendant did not contemplate

the actual purchase of 3000 barrels of flour, but submit that it does not establish any sub-understanding on the part of the plaintiffs. The company urge that Bloom was not authorized to make this particular contract; that the writing evidencing the agreement does not show on its face any illegality; that knowledge of the actual facts of the case was not brought home to them. We understand it to be intimated that even though plaintiffs' agent (acting as such) may have made an illegal contract, the contract could none the less be enforced if the principals themselves were not aware of its character, for it is claimed that their right to recourse would not be affected unless they were a party to the understanding which made them so. Bloom, in the transaction, unquestionably acted for and in behalf of the plaintiffs in making this agreement. The plaintiffs sue upon it. If they affirm it at all they must do so in its entirety as made; they can not affirm part and repudiate a part. Elam vs. Carruth, 2 An. 275.

Without entering into details of the testimony in the case, it suffices to say that we are satisfied that the plaintiffs had full knowledge from the beginning of the exact terms of this agreement. Referring to the writing on which this suit is based, plaintiffs' counsel claims that it is nowhere stipulated in it that the E. O. Standard Milling Company are to have the option of not making an actual delivery of the flour; that their obligation to deliver the flour when called for in the month of March, 1893, f. o. b. on the cars at St. Louis, is absolute and unequivocal, that it is only the DEFENDANT who is granted the right of not calling for the actual flour and the privilege of requiring a settlement by an adjustment of the differences in price.

With a view of testing the character of the agreement entered into between the parties, let us assume that on the 31st of March, 1893, the price of flour, instead of being $3.85 per barrel, the price mentioned in the agreement as the purchase price, had advanced to $4.85; that on that day, the defendant having notified the plaintiff that he would not accept delivery of the flour, they had paid into his hands the sum of $3000, and then ask *by what right and under what title* would the *defendant* have *received* the money, *and from what cause*, from a legal standpoint, would the *plaintiffs have paid it.* Would it have been paid to defendant by way of damages? Damages are given as the result and consequence of a breach of contract, but

in the case assumed there would have BEEN no breach of contract, and not only was there not a breach of contract AS A CONTRACT OF SALE, but the plaintiffs would have been unable under the contract (no matter how greatly might have been their desire or their interest to do so) to free themselves from their obligations as vendors by the performance of the legal obligation of the delivery of the flour imposed upon them as such by the law. In spite of themselves they would have been forced under the contract (if legal) to have paid the defendant a sum of money. If the money would not have been paid by way of result or consequence of a *breach of contract*, then it *would* have been paid by *way of direct affirmative performance of an original contract.* If that contract had been one of sale, the performance would have consisted of the delivery of the 3000 barrels of flour, but instead of this we find that the position of parties to a contract of sale would have been reversed, the vendors paying over instead of receiving money; and not only this, but the amount so paid differing greatly from that stipulated as the price of the flour. Reasoning backward from result to cause, we find that this original contract was not one for the sale of flour.

Taking the suit as it is, what is its character? Is it a suit for the specific performance of a contract of sale? If it was, then the demand would be for the purchase price stipulated in the agreement and plaintiffs would have alleged and would seek to prove a tender; but the demand is not for the purchase, and the necessity of the tender is absolutely denied. Is it a suit against the plaintiffs for damages? Clearly not. If the defendant (had the plaintiffs made a tender) had declined to receive delivery, his refusal would have been simply the exercise by him of the legal right so to do expressly reserved and stipulated in the contract, and damages do not flow from the exercise of a legal right. New Orleans vs. Wardens, 11 An. 244. The suit is for the specific performance of a contract, but the contract sought to be enforced is not a contract of sale. We are of the opinion that the agreement was purely and simply that which Bloom declares in his testimony. All parties clearly understood it to be a wagering, speculating future contract in which an actual delivery of the flour was not contemplated under any contingency. The agreement bears on its face that the parties were not contracting on the basis of the after execution by either of the legal obligations springing from a contract of sale, but expressly *ab initio* upon the

fact of the non-execution of such obligations. It will be noticed that *under no contingency* was the milling company to have the *right* of delivery—a right which it certainly would have, had the contract been one of sale.

In holding that the agreement fell under the provisions of Article 2983, which declares that "the law grants no action for the payment for what has been won at gaming, or by a bet, except for games tending to promote skill in the use of arms, such as the exercise of the gun, and foot, horse and chariot racing," and was, therefore, not enforceable, we are of the opinion the District Court reached a correct conclusion, and the judgment appealed from is therefore affirmed.

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No. 11,469.

W. H. HOWCOTT, J. E. AND F. X. RANSDELL VS. BOARD OF COMMISSIONERS OF THE FIFTH LOUISIANA LEVEE DISTRICT.

1. An assessor can not bring together a number of distinct properties belonging to different individuals—fix a single valuation upon them as a whole, and, ascribing the ownership of them all to one of the owners, assess taxes against him to the full amount of the assessment on that false assumption.
2. The act of the tax collector in advertising and adjudicating said properties in block to the State in enforcement of the delinquent taxes thereon so assessed, was without legal authority.
3. Property of one person can not be sold confusedly with those of others where there is no privity of estate between the parties; one person's property can not be sold to pay the debt of another.
4. The transferrees from the State of property held by it under such a title are not protected by the prescription of three and five years.

APPEAL from the Seventh District Court, Parish of Madison. *Montgomery, J.*

Jos. E. Ransdell Attorney for Plaintiffs and Appellees:

1. An illegal assessment is insufficient description of property and want of notice on radical defects. A tax sale under such conditions will be invaded and not protected by the prescription of either three or five years. 32 An. 228; 34 An. 123; 29 An. 510; 35 An. 1086; 37 An. 356.
2. Description in tax deed must be the same as that on assessment roll, which is the warrant to collect. Rougelot vs. Quick, 34 An. 126; Blackwell, pp. 123, 278.
3. Taxes must be legally due in their entirety, otherwise the sale is void. Rougelot vs. Quick, 34 An. 126.

4. There is no actual assessment of property as contemplated by law, when it is not assessed to the owner, *and is confusedly assessed with other property.* McWilliams vs. Michel, 43 An. 984.
5. An assessment is defective and a sale thereunder *null and void* when the property is owned in indivision, and is assessed to the estate of a deceased co-proprietor when he lived and died in another parish. Norris vs. Hays, 44 An. 904. The promiscuous commingling in an assessment of the lands belonging to several different proprietors (as in the instant case) is analogous to the case of lands owned in indivision, hence the sale thereunder would be null and void.
6. If the description includes more than the taxpayer really owns, the assessment will be void. For example, if the area of the tract, or the taxpayer's interest therein, is exaggerated the mistake is fatal. Saunders on Taxation, 108, and other authorities cited.
7. Separate tracts of land must be assessed separately and sold separately. When the property is assessed and sold in block, Art. 210 of the Constitution is violated, and the sale will be annulled. Saunders, p. 107, and authorities; Norres, Tutor, vs. Davis, 44 An. 907.
8. A tax sale of property, assessed in the name of one who is not the owner, is an absolute nullity and passes no title. LeBlanc vs. Blodget, 34 An. 107; 28 An. 537. Hence these sales were absolute nullities, beyond question, as to all lands which did not belong to Lambdin, or to Byrne, and if absolute nullities as to over one-half of the land included therein, it logically follows that they are null in toto.

W. M. Murphy for Defendant and Appellant:

1. Any attack upon the validity of a tax sale, except for the want of an essential prerequisite, is barred by the prescription of three years. Acts of 1874, page 156; *In re* Douglas, 41 An. 765; 40 An. 142; Barrow vs. Wilson, 39 An. 410.
2. All informalities connected with or growing out of any public sale are prescribed against by the lapse of five years. 33 An. 1174; 14 An. 777; 29 An. 535; 33 An. 673; 21 An. 584.
3. In every case where a tax sale has been annulled for insufficiency or illegality of the assessment, it will be found that the property has not been sufficiently described for its identification. 29 An. 510; 15 An. 15; 14 An. 709.

The opinion of the court was delivered by

NICHOLLS, C. J. In the years 1880, 1881 and 1882, the assessor of East Carroll parish assessed together, in the name of Samuel H. Lambden, a large body of lands separately described by numbers of township, range, sections and subdivisions of sections, at a valuation in block for all the lands, the same aggregating some nineteen hundred or more acres.

During the same years the assessor also assessed in similar manner

a large body of land aggregating two thousand and seventy-three acres in the name of Charles Byrnes.

In April, 1883, the tax collector of East Carroll advertised these lands for sale for delinquent taxes. The advertisements followed the assessments. At the sale made under the advertisements both bodies of land (each sold in block) were adjudicated to the State as the last and highest bidder.

The State subsequently transferred these lands to the defendant' the Fifth Louisiana Levee District.

On the 16th of May, 1892, plaintiffs instituted the present suit, in which they allege themselves to be the owners of certain described property included in the two sales referred to, by purchase from their former owners, Samuel H. Lambden and Charles Byrnes. In their petition they refer to and attack the sales of the said properties to the State as being nullities and a cloud upon their title. They pray for judgment annulling and setting aside any claim or title of the Fifth Louisiana Levee District to the lands described in their petition and quieting them in their own title to the same.

The attack upon both sales is substantially the same, varying only as to names of parties and description of lands.

They aver that no valid assessment of these lands was made. That only a small portion of the lands described in the assessments belonged to the parties in whose names they were assessed; that the greater portion belonged to other parties; that the portion belonging actually to the parties named was blended and confused with property of other persons, and charged with taxes not due by it. That a portion of the lands assessed to Lambden was situated in West and not in East Carroll, and a portion of the lands described was at a distance of many miles away and entirely separate from the other portion.

They aver that there was a large discrepancy in the lands assessed in the name of Byrnes, between the acreage set out in the tax rolls and the true acreage indicated by the description, and that the amount of taxes for which the property was sold being calculated upon an erroneous acreage was largely in excess of what was due by the 1020 acres of Byrnes land which was really included in the tax collector's deed.

That the lands were illegally sold confusedly with property belonging to other people and for taxes due for such other lands.

They charge that notice was not given to Lambden & Byrnes as required by Art. 210 of the Constitution. The defendants pleaded, first, as an exception, "the prescription of three years in bar of plaintiff's right to bring this action to invalidate a tax title under which defendants hold possession in good faith."

They next answered by a general denial, and pleaded the prescription of five years against all the alleged informalities charged in the petition.

Judgment was rendered in the District Court against the defendants, and in favor of the plaintiffs, in conformity to their prayer, and the defendants appealed.

The evidence establishes that a large part of the property assessed to Lambden and a large part of that assessed to Byrnes belonged not to them, but to other persons; that a part of that assessed to Lambden was in another parish, and a portion was entirely separate from the other lands and many miles away.

The witnesses testity: "That whilst Byrnes was assessed on 2078 acres the description of the land per official survey shows only 940 belonging to him *plus* 300 acres belonging to other parties; the whole amounting to 1240 acres instead of 2078." We do not think plaintiffs have shown want of notice to the former owners. The sales under the assessments having been made in block, and following the assessments, the question submitted to us is whether the former owners were divested of their title or not, and whether the defendant is protected and secured by the prescriptions set up.

There can be no question as to the assessments made having been wrongly made. The assessor has no legal right to include in one assessment and under one valuation properties belonging to different persons (Persons vs. O'Neal, 32 An. 228; Workingmen's Bank vs. Lannes, 30 An. 871) and the State, through its officers, had no right to sell together properties of different individuals assessed in that manner.

In suits between private individuals conducted under ordinary proceedings, where the rules of proceedings are far less rigorous than in tax proceedings, it has been on several occasions held that the property of one person could not be sold confusedly with that of another where there is no privity of estate between the parties. See Mavor vs. Armant, 14 An. 178, and Savage vs. Williams, 15 An. 252.

The property of one person can not legally be sold to pay the debt of another, even though through the sale a debt of his own may be paid, and the tax collector was without power or authority to do so. We are of the opinion that the prescriptions pleaded do not apply to this case.

For the reasons assigned it is hereby ordered, adjudged and decreed that the judgment of the District Court be and the same is hereby affirmed.

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No. 11,474.

BELAND AND JOHNSON VS. GEBELIN AND DUGGAN.

1. Before the court sustains an exception filed by a defendant his legal interest to take the particular exception must appear.
2. Plaintiff in bringing a petitory action is not necessarily forced to cumulate therewith an action of nullity to set aside judicial proceedings in which apparently his title in the property has been divested. He has at his risk the right to allege such proceedings to be absolute nullities and to go to trial on that issue.

APPEAL from the Fifteenth District Court, Parish of East Baton Rouge. *Buckner, J.*

Cross & Cross Attorneys for Plaintiffs and Appellants:

1. The rule that the decree protects the purchaser is subject to two conditions: (1) That the court is competent, in the subject matter, to render the decree. 14 L. 278; 13 An. 476; 25 An. 154; 2 L. 328; 11 L. 156; 20 An. 233; 29 An. 523; 30 An. 139, 727; 28 An. 310; 30 An. 482, 1111; 40 An. 571; James vs. Meyer, 41 An. 1106. (2) The purchaser must be an innocent third party. (11 An. 3; 14 An. 622; 34 An. 293, 1017); and a deputy sheriff can not claim this position. 8 N. S. 165; 6 L. 407; 9 L. 44; 15 L. 398, 4. R. 205.
2. A judgment in attachment suit, without citation, or actual seizure of property, is absolutely null, and can be collaterally attacked. 4 An. 187; 6 An. 551; 7 An. 669; 15 An. 709; 33 An. 615; 1 N. S. 9; 6 L. 377; 11 R. 121; 6 An. 265; 2 An. 492; 6 R. 205; 2 An. 569, 508; 13 An. 431; 20 An. 76; 21 An. 27; 24 An. 253; 26 An. 780, 785; 28 An. 421. So, a sale by the Federal marshal can be attacked in a State court. 31 An. 746.
3. A sale of property under administration under a *fi. fa.* is an absolute nullity. 13 An. 476; 25 An. 154.
4. A return showing an adjudication by a defunct sheriff is void. In such case it is the duty of the acting sheriff to execute the deed. C. P. 691-2. Voorhies Revised Laws, Sec. 3486.
5. On a trial of an exception the facts of the petition must be taken as true. (9 An. 265; 10 An. 586); for allegations not denied are presumed true. 11 An. 516; 14 An. 187; 18 An. 161; 20 An. 430; 31 An. 433.

J. A. Addison Attorney for Defendants and Appellees:

1. A sale of real property belonging to a succession, under a decree of a competent court, will not be held to be an absolute nullity on account of irregularities in the mortuary proceedings which lead to the granting of the order. In such a case the claimant under adverse title must cause the sale to be annulled by direct action. 28 An. 331.
2. The title acquired at a judicial sale is presumed to be valid until the contrary is shown in a direct action to revoke and annul, contradictorily with all parties in interest. 29 An. 116.
3. Sales directed or authorized by the courts of probate are judicial sales to al legal intents and purposes (13 La. 433) and purchasers thereat are not bound to look beyond the decree. 10 R. 396; 138 U. S. 456; 44 An. 421. He must look only to the jurisdiction of the court. Art. 109, Constitution 1879.
4. No relative nullities in the title of either plaintiff or defendant can be inquired into, even though there have been fraud. Hen. Dig. 1114, No. 2.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiffs aver that they are the sole heirs of their father and mother, Jean Marie Lancelot and his wife. That their father's succession was opened in East Baton Rouge and a certain piece of real estate described in their petition was inventoried as community property. That John O'Connor, in his capacity as public administrator, took possession of said property on June 17, 1871, and rendered his final account, which was homologated December 31, 1873. That in the decree homologating the account the parish judge ordered the property to be sold to pay debts and effect a partition, but that this sale was arrested by a decree of court affirmed on appeal June 29, 1878, on the petition of C. D. Favrot, tutor of plaintiffs, who were then minors. That on March 31, 1884, said John O'Connor, *ex parte*, procured an order to sell property to pay debts, and an undivided half interest in said property was adjudicated to Joseph Gebelin, but said sale was an absolute nullity for the following reasons:

1. The court was without jurisdiction to render the order. The public administrator was *functus officio* and his office abolished. In this matter his final account had been homologated and he was specially enjoined and prohibited from selling said property by a decree still in force.

2. The sale was an absolute nullity, because it purported to sell the undivided half interest belonging to the father to pay community debts.

3. That all the debts as set forth in the account of 1873 were presumably paid and prescribed, and by inspection the purchaser could see said order was *ultra vires*.

4. That petitioners having been represented by a tutor were necessary parties to any proceedings to sell.

5. That Joseph Gebelin was deputy sheriff and could not validly purchase property sold by the sheriff.

That about the time of this sale there turned up among waste papers in the sheriff's office a pretended sale by the sheriff of the other undivided half interest in said property to B. Feibelman, made in execution of judgment in Feibelman vs. Lancelot, No. 682, parish court, and by *mesne* conveyances the said half interest has been transferred to Joseph Gebelin.

That said sale was never treated or intended to be a serious sale. The judgment in Feibelman vs. Lancelot, which was under attachment proceedings, was an absolute nullity. There was no citation and the property was never actually in the possession of the sheriff, but remained continuously in the possession of John O'Connor till March, 1884. That said sheriff's sale was nothing but a *projét* and not an executed title. It was never recorded before 1884, when B. Feibelman sold his litigious claim without warranty to John H. Lamon for $50, which was a nullity, as said Lamon was an attorney, practising in said court. That said property is worth $3000 and the annual revenue $250. That Joseph Gebelin is the ostensible owner of said property, but Timothy Duggan, of said parish, is in possession, and plaintiffs are informed and believe has a title to said property either for his own benefit or for the benefit of said John O'Connor. That said Duggan is the confidential friend of said O'Connor and has been acquainted with all the facts and circumstances connected with the illegal divestiture of plaintiffs' title from the beginning.

Plaintiffs prayed for a citation upon Gebelin and Duggan, and for judgment recognizing them as owners of the property, and for a writ of possession putting them in possession thereof. They further prayed for judgment against Gebelin and Duggan *in solido*, at the rate of $250 per annum, from March, 1884, till the trial of this suit, reserving to them the right to sue for revenues from the trial of the suit until final delivery.

Timothy Duggan *in limine* filed a peremptory exception to plaintiff's petition on the following grounds:

1. That in the suit of Feibelman vs. Lancelot, No. 682, Parish Court of East Baton Rouge, filed May 18, 1872, execution was issued and Feibelman, the plaintiff therein, became the purchaser of the

undivided one-half of the two lots of ground described in plaintiff's petition.

2. That said Feibelman sold his interest in said lots to J. H. Lamon on the 20th day of July, 1880.

3. The said J. H. Lamon was recognized as and decreed to be the owner of said property so purchased by him in suit of J. H. Lamon vs. John O'Connor, Administrator, No. 608, Seventeenth District Court for East Baton Rouge, filed March 20, 1884, and subsequently sold his interest in said lots to Charles McVea.

4. Joe Gebelin became the purchaser of the other undivided one-half of the said two lots at the public sale made in the matter of the succession of J. M. Lancelot, deceased, which sale was ordered by a court of competent jurisdiction, and the purchaser is not required to look beyond the jurisdiction of the court.

5. Charles McVea instituted suit against Gebelin for partition of said two lots (No. 702, Seventeenth District Court for the parish of East Baton Rouge), which partition was decreed to be by public sale, and thereat Gebelin became the *bona fide* purchaser of both lots for a valuable consideration.

Neither one nor all of the above and foregoing sales and solemn adjudications can be attacked collaterally, but plaintiffs must institute a direct action to revoke and annul them and make proper parties thereto. He prayed that the peremptory excep ion be maintained and that plaintiffs' suit be dismissed.

This exception having been fixed for hearing, on the hearing thereof exceptor offered in support of the same the records of the various proceedings referred to in his pleadings.

To the introduction of this evidence as it was offered, plaintiffs' counsel objected on the ground that, viewed as an exception, the same should go to trial admitting all the facts set forth in plaintiffs' petition to be true, but that said so-called exception is really an answer, and the object of introducing said testimony is to covertly set up issues *en pais* collaterally, thus trying the case piecemeal, confusing the issues involved in the case.

The court overruled the objection and admitted the evidence, the objection to go to the effect. To this action of the court plaintiffs excepted.

The court finally acted upon the exception, maintained it and dismissed the suit. Plaintiffs have appealed.

It is true plaintiffs made Timothy Duggan a party as being in possession of the property, but they allege that the title stood in the name of Gebelin and the exception filed shows such to be the fact. Plaintiffs' allegations as to Duggan were merely tentative; they did not allege absolutely and positively that he had or claimed any interest in the property, and merely called him into court to the end that he might either disclaim or announce his *actual* interest and position. At the time he filed his exception he had done neither; *non constat* that he has really any interest at all in the matter, any concern in the titles or even in the possession.

Under that condition of affairs the District Court, at his instance, dismissed plaintiffs' suit not only as to Duggan but as to Gebelin. In this action it was clearly wrong. Duggan had in no manner claimed to represent Gebelin. Possibly the only exception he was entitled to have filed even so far as concerned himself was that he should be dismissed from the suit as having no legal connection with the issues involved. In the manner and form in which he had been made a party he might, as matters stood, have filed exceptions looking to his own discharge from the suit, but not tending to throw plaintiffs out of court.

Assuming, however, that Duggan had shown such connection with the issues as to entitle him to raise the particular question involved in the exception, we are of the opinion that the evidence offered should have been excluded and the rights of parties should have been tested on the face of the papers. There is no doubt as to the legal necessity under certain circumstances of bringing direct actions to annul judicial proceedings and decrees, contradictorily with the parties legally interested in maintaining them, as conditions precedent to relief asked, but the necessity for such direct action is contingent upon the issues which the plaintiff tenders. In a petitory action brought under ordinary conditions the only parties necessary originally to the action are the plaintiff claiming ownership of property and a defendant in possession of the same. If the defendant deems it to his interest that his vendor, his lessor or other parties be brought into the proceedings it is for him to take steps leading to that end. The plaintiff in this case has not cumulated with the petitory action proper, actions of nullity against the various proceedings alluded to in the pleadings and made parties accordingly, for the reason that the theory of his case is that all those proceedings are ab-

solute nullities, needing no judicial action to set them aside; that they are void, not voidable. The allegations of the petition are to that effect. If the plaintiffs think proper to go into this case on that basis on the strength of the correctness of their legal conclusions on that subject they have, AT THEIR OWN RISK, the right to do so. Should it turn out on inquiry that the proceedings alluded to were not void as claimed, but simply voidable, and the case should be before the court without proper parties and the proper prayer, plaintiffs will take nothing by their action. Defendant can not *in limine* and on exception introduce evidence and have the court pass upon the character of the proceedings which plaintiffs assume to be and characterize as absolute nullities. That will be one of the issues on the merits.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed; and it is now ordered and decreed that the case be reinstated in the District Court, to which it is hereby remanded for further proceedings according to law.

No. 11,486.

HEIRS OF JOHN FORD VS. MILLS AND PHILLIPS.

1. A succession sale made under an order granted by the clerk of court upon application of a person acting as administrator can not be dealt with as an absolute nullity upon the ground that the particular person had not the qualifications necessary for appointment, nor because, though letters of administration signed by the deputy clerk were in the record, there was no direct evidence of an appointment by the clerk. The action of the latter granting the order of sale was a recognition by him of such an appointment and that the party had legally qualified under it.
2. Where the deed under which a party claims title to real estate as vendee at a succession sale does not recite that it was made under order of court and is otherwise silent as to the observance of the formalities essential to the legality of such a sale, and where the evidence shows that the auctioneer in selling departed from the terms of the order authorizing a sale, such title can ot serve as the basis for the commencement of the prescription of ten years
3. Where the title tendered to a purchaser makes no reference to that under which the vendor holds, bad faith can not be presumed in the purchaser from the fact that the vendor's title was of record and fatally defective.
4. Declarations of former owners of property in derogation of their own title and good faith made after they had ceased to be owners are not admissible against the subsequent vendees of the same.

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5. Plaintiff in bringing a petitory action is not forced to cumulate therewith a direct action of nullity with proper parties to set aside judicial proceedings under which his title has apparently been divested, if he alleges that such proceedings are absolute nullities. He has the right, at his risk, to tender and go to trial on that issue.

APPEAL from the Eighth District Court, Parish of Catahoula.
Dagg, J.

Frank B. Thomas and *Allen B. Hundley* Attorneys for Plaintiffs and Appellants:

A person in no manner related, not an heir and not even a creditor, is not entitled to the administration of an estate. C. C., Arts. 1046, 1049.

A curator or administrator must take an oath before the judge (or before some officer legally authorized to administer oaths), who has appointed him, before he enters on the performance of his duties. C. C., Art. 1126.

It is only after the lapse of ten days, and notices given, and after the inventory is closed, that the appointment can be made. C. C., Art. 1114, 1115; C. P., Art. 966, 967, 970.

Clerks of court can not appoint administrators until after the legal notices are given, nor can he grant orders for sale of succession property, unless application be accompanied with statement of debts. R. S., Secs. 308, 310, p. 78.

The conditional order appointing administrator must be followed by a second order appointing and confirming, and an order that letters of administration issue, after the expiration of the publication of the notices required by law. 39 An. 298, Sec. 3; 35 An. 405; 40 An. 233.

Curators or administrators must wait thirty days after their appointment before they can demand the sale of the immovable property. C. C., Arts. 1164, 1165, 1166, 1167, 1168.

It should be presumed that no sale is necessary or that sufficient money is on hand to pay debts; if not, creditors can apply to the court to sell property. C. P., 990, 991, 992.

An administrator can not pay debts without an order of court. C. C., Arts. 1179, 1180, 1181, 1184, 1185, 1186.

To be *prima facie* evidence of a valid title, a deed to property sold at a judicial sale must state and set forth on its face every essential fact to show that they complied with the law; otherwise it is radically defective in form and substance. 8 Martin, 6 and 9; 30 An. 1275.

The sale of a thing belonging to others is absolutely null, and the prescription of ten years will not prevail. C. C., Art. 2452; 29 An. 560; 4 R. 26, 201; 14 An. 598.

A deed not valid in form can not form a foundation for the prescription of ten years. C. C., Art. 3486; 38 An. 885.

A deed which, on its face, shows radical defect is such a notice to a purchaser as would make him a possessor in bad faith. C. C., Art. 3452.

Prescription does not run against minors. C. C., Art 3522.

Potts & Hudson Attorneys for Phillips, and *J. F. Ellis* and *D. N. Thompson* Attorneys for Mills, Defendants and Appellees:

The order of court appointing an administrator is a judgment, which can not be attacked collaterally, and can only be annulled in a direct action brought against the administrator for that purpose. 28 An. 806; 10 An. 496; 2 La. 249; 2 An. 538; 8 An. 85; 19 An. 69.

The acts of a *de facto* administrator, acting under letters issued by a competent court, are valid and legal, although the order or judgment appointing him may be illegal, so long as the judgment making the appointment remains in force. Administrators are officers of the court, and their acts, like those of other public officers, done in pursuance of their duties as such, are valid and binding until deprived of their office in a direct action. 2 La. 249, and others.

An action not brought against the administrator directly, and to which the administrator is not a party, is not a direct action, and in such a collateral proceeding the judgment appointing the administrator can not be attacked nor annulled. 8 An. 85; 10 An. 496; 28 An. 806.

In judicial proceedings courts and officers are presumed to have done their duty. The administrator making the sale under orders of the court is presumed to have complied with all the formalities of the law in making the sale, and the burden is upon those alleging to establish the want of these formalities by legal evidence.

The adjudication completes the sale made at public auction. The deed afterward prepared and executed is but the evidence of the sale. The deed may be informal or defective, while the sale and adjudication is legal and valid. C P., Art. 695; 29 An. 207; 31 An. 276; 36 An. 776.

Purchasers at public sales, under orders of courts having jurisdiction, are not compelled to look beyond the order or judgment of the court ordering the sale. 31 An. 276; 39 An. 67; 14 An. 632; 19 An. 353; 20 An. 124; 15 An. 250; 2 An. 468; 18 An. 485; 21 An. 505.

An error in the manner of signing the deed does not invalidate the sale, the only question being whether the deed came from one having the power to represent the succession and make the sale. 28 An. 806.

The prescription of five years cures all informalities in public sales, such as want of advertisement, want of appraisement, offering at wrong time or place, failure to announce terms and conditions of sale, etc. 21 An. 506; 10 Rob. 396; R. C. C. 3543; 29 An. 584; 33 An. 1176; 39 An. 60; 28 An. 571; 34 An. 209; 32 An. 437, etc.

He who acquires an immovable in good faith and by a just title prescribes for it in ten years. R. C. C. 3478.

Good faith is always presumed in matters of prescription, and he who alleges bad faith in the possessor must prove it. R. C. C. 3481.

This court will notice *ex proprio motu* the want of proper parties and will not render judgment in a cause affecting parties not before the court. Liquor and Tobacco Company *et als.* vs. Jeffries *et als.*, 45 An. 632.

The opinion of the court was delivered by

NICHOLLS, C. J. John Ford died in 1863, leaving eight minor children, some personal property and the small tract of land in the parish of Catahoula which forms the subject of this litigation. In

1865 one Dean applied to be appointed administrator, alleging that an administration was necessary in order to liquidate and settle the succession and pay debts. On the 12th De.ember, 1865, the district clerk signed an order directing the advertisement of the application according to law, and "decreeing that if after the expiration of said period no opposition be made in the meantime, he be appointed administrator on his giving bond and security for the sum and conditioned according to law and on his complying with the law in all other respects." On the 2d January, 1866, the *deputy clerk* issued letters of administration to Dean, in which after a recital that Dean "had been appointed administrator of the succession of John Ford and taken the oath and executed bond as prescribed by law," it is declared: "therefore, be it known that the said A. B. C. Dean is hereby confirmed in said appointment."

On the 11th January, 1866, the district clerk, upon an application of Dean, as administrator, praying for a sale of all the property of the succession to settle and liquidate the same, rendered an order of sale of all the property "at public auction on the terms and conditions required by law."

On the 26th December the following instrument, upon which the title of the defendants is based, was executed by Dean and placed of record:

STATE OF LOUISIANA,
Parish of Catahoula.

Know all men by these presents, that I, A. B. C. Dean, administrator for the heirs of John Ford, did offer for sale on the first day of December, 1866, according to law, the tract of land below described to highest and last bidder, whose name will also appear below. Therefore, the aforesaid Mr. Dean, a resident of Catahoula parish, Louisiana, does bargain, sell, convey and deliver unto Solomon Jemison, a resident of the aforesaid parish and State, and Ransom B. Jemison an equal portion of said land, the said Ransom B. Jemison being a resident of Caldwell parish, the following tract or parcel of land, with all the improvements and appurtenances thereunto belonging, on what is known as Sandy Creek, Catahoula parish, Louisiana, to-wit: (Here follows a description of the property.)

"The consideration of the above named land given by the Jemi-

son brothers is seven hundred and forty-five dollars, for which they have executed their joint notes for, made payable to A. B. C. Dean or order, due on the first day of December, 1867, with Josiah Jemison and C. P. Kees as security to said notes. Now it is the true intent and meaning of both of the above contracting parties that the above described land is to remain specially mortgaged and hypothecated, and the same is hereby mortgaged and hypothecated for the payment of the above described notes.

"In testimony whereof we have this day signed our names and affixed our seals thereunto in the presence of W. H. Holloman and Levi Prestridge, witnesses of lawful age and domicile. Signed, sealed and delivered on this the 22d December A. D. 1866.

(Signed) " A. B. C. DEAN. (SEAL.)
(Signed) " SOLOMON JEMISON. (SEAL.)
(Signed) " RANSOM B. JEMISON. (SEAL.)

Witnesses:

(Signed) " W. H. HOLLOMAN.
(Signed) " LEVI PRESTRIDGE."

On the *22d November, 1869*, *Solomon* and *Ransom Jemison* sold the property to *R. L. Elliot.*

R. L. Elliot sold to W. H. ELLIOT on the *26th December, 1886.*

W. H. ELLIOT sold to *William McBroom on the 18th day of October, 1888.*

William McBroom sold to F. M. MILLS (one of the defendants) *on the 27th day of May, 1890.*

F. M. Mills transferred a portion of this property to C. G. WOODBRIDGE, *on the 9th day of February, 1891,*

C. G. Woodbridge sold his interest on the 29th day of June, 1891, to GUY PHILLIPS.

F. M. Mills and *Guy Phillips* are at present in possession of the property under their respective titles, and claim to be owners thereof.

On the *25th July, 1892*, the plaintiffs, as heirs of *John Ford*, instituted the present petitory action against *Mills and Phillips*, praying to be declared the owners and placed in possession of the tract of land referred to, and for rent of the same, at the rate of $200 *per annum*, from the 27th May, 1890.

Plaintiffs attack all the proceedings in the matter of the succession of Ford, and declare them to be absolute nullities.

They allege that Dean was neither a creditor of the succession of Ford nor a relative or connection of the family; that he had no right to be appointed administrator; that the original order touching the appointment, signed by the district clerk, was null and void, as it was a conditional order of appointment, and the subsequent order signed by the deputy clerk was also an absolute nullity, as he was without power or authority to appoint or confirm an administrator. They allege that the order of sale was granted within three months of the appointment of the administrator in violation of Art. 1164 Revised Civil Code, that there was no necessity for the sale of immovable property; that no creditor applied for a sale, and Dean never filed a statement of debts. That the pretended sale to the Jemisons was absolutely null as a judicial sale; that it was nothing more than a private sale by Dean to said parties; that in making the same, Dean did not pretend to make it as administrator of the estate of John Ford or auctioneer, but as administrator of the heirs of John Ford, which he never was; that it was also absolutely null as a judicial sale, for the reason that none of the forms of law for such a sale were complied with; that it was not advertised for sale in three public places in the parish of Catahoula; that the deed of sale does not recite that it was made in pursuance of or in obedience to any order of court; that it had been advertised to take place at the court house door or at the late residence of the deceased for thirty days preceding the sale, or for any number of days, in three public places in the parish, designating said places; that he had offered the same for sale to the by-standers in an audible voice, or that he proclaimed the terms of sale, whether for cash or on a credit of twelve months, nor that he adjudicated said lands and improvements to the said Jemisons as the last and highest bidders as administrator and auctioneer of the estate of John Ford, deceased; nor did Dean sign the deed to the Jemisons as such, but signed the same in his individual name, thereby making it a private sale and absolutely null and void; that in point of form and legal requirements it could not form the basis of the commencement of prescription; that the deed does not show whether it was the first or second attempt at sale; that if for the first attempt it was null and void, as it was sold for less than the appraisement. That the Jemisons and all the other parties holding under them were purchasers and transferees and possessors in bad faith; that they had actual and constructive

knowledge and notice of all the illegalities and informalities connected with the sale; that the deed of sale to the Jemisons conveyed no legal title to them, and they could not legally convey title to another.

Defendants filed exceptions, only one of which has been referred to in this court.

That exception, which was to the effect that the necessary parties had not been made and that the persons holding and claiming the property as owners under the Dean deed and since should have all been made parties, was overruled and defendants answered.

They pleaded the general issue, averred their good faith, maintained the legality and validity of the proceedings in the matter of the succession of Ford and of the various titles thereunder. They averred that the purchase price of the sale to the Jemisons was received by Dean, administrator, and applied by him to the payment of valid existing debts of the succession, and finally pleaded the prescription of five and ten years.

The plaintiffs having alleged the absolute nullity of the proceedings in the matter of the succession of Ford and gone to trial on that issue, we do not think it was necessary for them to have made other parties than those before us. See Belard & Johnson vs. Gebelin & Duggan, decided this day, also, Succession of Bright, 38 An. 141.

The District Court held the sale from Dean to the Jemisons to be so radically null as not to serve as the basis for the commencement of prescription. It was of the opinion, however, that there was no evidence before it impugning the good faith of R. L. Elliott and those holding the property after him, and therefore took as the initial point of prescription the date of R. L. Elliott's purchase. With that date as the starting point, the court held that the prescription of ten years had accrued even as against the minors. It therefore sustained the plea of the prescription of ten years and rejected plaintiffs' demand. They appealed.

We are of the opinion that plaintiffs' objections in so far as they seek to base the nullity of the transfer of the property to the Jemisons upon the ground that Dean was not the administrator of the succession for the reason that he was neither a creditor nor a relative or connection of the Ford family, and that there is not in the record any evidence of a direct order of the district clerk himself

appointing him as such, but simply a paper from which it would appear that Dean's appointment rested upon the unauthorized act of a deputy clerk, can not be inquired into in the collateral manner attempted. The order of sale was granted by the district clerk upon a petition addressed to the court by Dean as administrator and he was at least a *de facto* officer. We presume, besides, that there must have been some intermediate order between the original one of the district clerk and the later one of his deputy. We think the paper signed by the latter was intended to be merely the "Letters of Administration" which issue to an administrator after he has complied with the law. We agree with the district judge, that the claim of ownership to the property in litigation based upon the prescription of ten years, as founded upon the alleged sale to the Jemisons, is untenable. The deed of sale upon which this claim rests is radically defective in its recitals and form, and *dehors* the deed, we are satisfied that Dean—if he were acting in the matter of the sale under the order of the court—departed from the terms of the order. He was ordered to sell according to law, and the evidence shows that there was no attempt whatever to sell the property for cash, but that it was transferred at once to the Jemisons upon their furnishing their notes payable at twelve months. The case falls under the operations of the principles announced in the case of Ambrose vs. Marsh, 27 An. 241; see also Succession of Fritz, 12 An. 368.

We next come to defendant's claim of prescription, based upon the transfer of the property by the Jemisons to R. L. Elliott, and upon the subsequent changes of ownership. If R. L. Elliott's title and possession was of such a character as to serve as the commencement of the prescription of ten years, the conclusions reached by the district judge on this branch of the case were correct, except as to Elijah Ford.

We have therefore to inquire into the question of the prescription of ten years, based upon the transfer of the property from the Jemisons to R. L. Elliott and upon the subsequent changes in ownership.

Plaintiffs contend that had the court permitted J. J. McKeithen, Thomas Davis, Col. M. C. Davis and Wade Hough to testify upon the points which they sought to interrogate them upon and had not excluded their testimony as it did (but under reservation of their bills of exception), they would have established the bad faith of the two

Elliotts and McBroom. They contend that the excluded testimony was admissible. We think the judge's ruling correct. Plaintiffs sought to prove, as against the defendants, declarations of former owners made to those witnesses derogatory to their own titles—those declarations having been made subsequent to their having themselves alienated the property. Declarations made under such circumstances can not be permitted to affect subsequent vendees. We were inclined to doubt the propriety of the ruling as to Hough's testimony, as it does not very clearly appear from the record what the date of the statements to Hough was, but it was plaintiffs' duty to have made the recitals show the date with certainty, so as to affirmatively establish error on the part of the judge. We have to assume his rulings to be correct until the contrary is made manifest. There was no reference in the title tendered to R. L. Elliott to that under which the Jemisons acquired. Bad faith can not be presumed from the fact that the Jemison title was of record. Fletcher vs. Cavelier, 4 La. 274; Ribas vs. Bennett, 5 La. 242; Heirs of Self vs. Taylor, 33 An. 769; Pattison vs. Maloney, 38 An. 885.

Plaintiffs claim that under any circumstances minority has saved the rights of the children of William Duncan Ford and those of Elijah Ford. We think that the evidence establishes that the prescription of ten years had run as against William Duncan Ford before his death—he must have been thirty-four years of age at that time. He became of age in 1872 and died in 1885. R. L. Elliott purchased the property as we have seen in 1869. Elijah Ford must have become of age in 1883. Prescription as to him was not completed when this suit was brought. For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed as to all the plaintiffs—Elijah Ford excepted. It is further ordered, adjudged and decreed that the judgment be annulled, avoided and reversed as to Elijah Ford, and judgment is now rendered in his favor and against the defendants, recognizing and declaring him to be the owner of an undivided interest in the property mentioned in the petition to the extent of the interest inherited by him in the same. That interest not clearly appearing by the record as to its extent, the case is remanded to the lower court to have the same ascertained, fixed and declared; costs of appeal to be shared between the appellants, other than Elijah Ford, and the appellees in proportion to their respective interests.

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No. 11,429.

MRS. ADA LESTER VS. A. W. CONNELLY, SHERIFF, ET AL.

When a married woman, separate in property, sells by authentic act her paraphernal property, although the sale is a disguised mortgage for the benefit of the husband, yet if the notes given for the purchase price fall into the hands of innocent third parties, the vendor's lien and special mortgage securing the notes will be enforced.

There is no distinction in principle, between the holder of notes given for the purchase price of the property, and the purchase of such property, as the reliance of both of the note holder and purchaser is upon the public record. When that discloses an unimpeachable title, the protection of the law is afforded as against unknown and latent defects. Schepp vs. Smith, 35 An. 6.

The mortgage accompanies the negotiable note which it secures, in its transfer to an innocent holder. The secret equities between the original parties cannot affect his title to the sale, or impair its validity or that of the mortgage.

APPEAL from the Eighteenth District Court, Parish of Terrebonne. *Caillouet, J.*

L. F. Suthon Attorney for Plaintiff and Appellee:

A married woman can not bind herself for her husband's debt. C. C. 2398.

Courts will look through all disguises to protect the property of married women, and will find out the real nature of the contract. 12 An. 852; 33 An. 1008; 34 An. 822.

The law prohibiting a wife from binding herself for her husband's debts is a law of public order, and whatever is done in contravention thereof is tainted with absolute nullity. C. C., Arts. 11 and 12; 14 An. 169; 9 La. 589.

A mortgage may be put in the form of a sale. The conveyance does not vest the ownership in the apparent buyer. 31 An. 848; 38 An. 154.

The doctrine of estoppel, as ordinarily understood, does not apply to married women. 2 An. 756; 33 An. 1010; 34 An. 632; 45 An. 878.

Where a married woman has been guilty of no actual fraud or deception, but has been a mere passive agent under the coercive influence of the husband, she will be protected. 14 An. 169; 42 An. 950.

The marital influence is presumed, and the wife's testimony, as to its exercise, will be corroborated, when it is shown she has received no benefit. 2 An. 756; 45 An. 873.

The law relating to innocent third holders of negotiable paper is not of universal and unlimited application, but is subject to well defined exceptions, among which are:

1. Cases where the legality of a transaction depends not on the nature of the consideration, but on the capacity of the party to contract the obligation. 5 N. S. 55; 5 An. 495.
2. Where the instrument was given for a consideration which by statute is declared void, the original taint follows it, and it is void in the hands of every holder, however innocent. State vs. Maurice J. Hart, 46 An. 40.

3. The *lex mercatoria* is not paramount, but is limited and modified by the constitutional and statutory provisions of every sovereignty where it prevails. Smith's Mercantile Law, Sec. 248, notes; 21 An. 567-685.

While, therefore, the notes given in this transaction may be valid against the maker as mere commercial instruments, yet the sale and mortgage, out of which they grew, are utterly null and void, and the mortgage and vendor's privilege can not be enforced.

Mortgages in a case like this are subject to equities. 28 An. 855; 8 R 435; 14 An. 587; 31 An. 684; 33 An. 870; 45 An. 75.

The paraph *"Ne varietur"* is sufficient to put a party on guard. 26 An. 375; 39 An. 732.

The transaction of sale being with a married woman is sufficient to put a party on guard. 29 An. 123.

The continued possession of the vendor is also a circumstance sufficient to put a third party on inquiry. 44 An. 880; Broussard vs. Broussard, 45 An. 1085.

Beattie & Beattie and *Andrew H. Wilson* Attorneys for S. Pfeifer & Co., Appellants:

The purchaser of negotiable notes, acquired before maturity in the open market for valuable consideration, is not subject to any equities between the original parties. Notes secured by lien and mortgage pass with all the securities thereto attached. An innocent third party acquiring such notes can not be attacked by the mortgagor or mortgagee.

An authentic act of sale, complete on its face and duly registered, made by persons capable in law of contracting, and upon the face of which there is nothing to give rise to any suspicion of its correctness and honesty, can not be attacked, particularly by parol or by a party thereto. In no event could such an attack be allowed against an innocent purchaser, or one acquiring valuable rights thereunder.

When a married woman sells her property, in the solemn form of authentic act, complete in every particular, she is bound thereby, and can not set up against an innocent third party, who has acquired valuable rights under said sale, any equity that would tend to destroy such rights.

The opinion of the court was delivered by

McENERY, J. The plaintiff, wife of Felix Bascle, is separate in property from her husband and authorized to administer her own affairs separate and apart from her husband.

Felix Bascle, the husband, was a merchant in the town of Houma, and indebted to Levis Brothers, in the city of New Orleans. He was embarrassed and unable, without security, to obtain further assistance from said firm. In 1891 Mrs. Bascle, duly authorized by her husband, sold her separate property, a house and lot in the town of Houma, to one Leveque, the book-keeper of said firm.

The price and consideration of the sale was $1700, $200 cash, and the balance of the purchase price was represented by Leveque's three notes, secured by vendor's privilege and special mortgage, payable to his own order and by him endorsed, each for $500, at six, twelve and eighteen months. The notes were paraphed by the notary to identify them with the act of sale.

In 1892, before maturity, these three notes were transferred as collateral security to the commercial firm of S. Pfeifer & Co., of the city of New Orleans, by Levis & Brother, who received them from Leveque.

Pfeifer & Co., after the maturity of the second note, brought suit to enforce the payment of the two that were due against Leveque, the vendee of Mrs. Bascle, who in February, 1893, confessed judgment in their favor in the sum of $1000 and interest, with recognition of vendor's privilege and mortgage on the property as stipulated in the act of sale and mortgage.

An execution issued on this judgment and the property mortgaged in the town of Houma was seized by the sheriff.

On the petition of Mrs. Bascle, the vendor of the property to Leveque, an injunction issued directed to the sheriff and plaintiffs in execution, restraining the sale.

The petition for the writ of injunction alleges that Bascle, the husband, was indebted to Levis Brothers in the sum of three hundred dollars; that said firm refused to advance to him without security, whereupon her husband, having no security to offer, appealed to his wife to place a mortgage on her property in order to enable him to continue his business; that she refused to mortgage said property, and that the husband, using his marital influence and power over petitioner, compelled her assent to mortgage said property for the purposes stated; that said sale was a sham and pretence, and that Leveque was an interposed party in the interest of Levis Brothers, to whom the property was mortgaged solely for the debts of the husband; that she never had possession of the notes given for the purchase price, and that they were delivered immediately by the notary to Levis Brothers. She never knew until the seizure what became of the notes. That since said pretended sale she has exercised dominion and control over the property, and has remained in undisputed possession of the same, and that she has paid all taxes on the property.

She alleges that the plaintiffs in execution are not innocent third parties. The prayer is the usual one for judgment in such cases.

The defendants in injunction answered, alleging that they were the lawful holders of said notes, acquired in good faith before maturity for a valuable consideration. They ask judgment for twenty per cent. on the amount of the judgment enjoined, and ten per cent. interest on the judgment, and damages for attorney fees incurred in the defence of said injunction.

There was judgment for plaintiff and defendants appealed.

It will be unnecessary to discuss the issues presented by the evidence in the record to show that Mrs. Bascle conducted the business in her own name, and the proceeds of the notes, less the amount due Levis Brothers by the husband, placed to her individual credit, and that goods were furnished her on this amount credited to her.

The sale of the property to Leveque, who was an interposed party for Levis Brothers, is shown by the evidence to have been in fact a mortgage for the purpose of appropriating the proceeds for an indebtedness due by the husband to this firm, and as security for other advances.

As between the parties to such an act, and those who should acquire the property or the notes, with notice and knowledge of the true character of the transaction, the act of mortgage, disguised as a sale, would undoubtedly be declared null and void. Civil Code, 2398, 126, 127, 128; Parmer vs. Mangham, 31 An. 848; Crozier vs. Ragan, 38 An. 154, and Bisland vs. Provosty, 14 An. 169.

In order to protect the wife, she is authorized to show the real motive of the contract, or transaction, and is not estopped by her declarations in the act. Vicknair vs. Trosclair, 45 An. 373; McIntosh vs. Smith, 2 An. 756; Chaffe, Bro. & Son vs. Oliver, 33 An. 1010; Harang vs. Blanc, 34 An. 632.

In the disguised contract, if it be one, the wife separate in property had the legal right to enter into, third parties without notice are protected. Justice imperatively demands the maintenance of this doctrine. Chaffe, Bro. & Son vs. Oliver, Administrator, 33 An. 1010; Schepp vs. Smith, 35 An. 1; Succession of Forstall, 39 An. 1052; Bank vs. Flathers, 45 An. 75; Vicknair vs. Trosclair, 45 An. 373.

If a party had purchased the property on the apparent valldity of the title placed on record by the plaintiff, without knowledge of the

real character of the transaction, his title would be protected against the demand of the wife. Broussard vs. Broussard, 45 An. 1085.

There can be no difference in principle between the holder and owner of the notes given for the purchase price, and the purchaser of the property, as the reliance of the purchaser of the notes and of the property, is upon the record. When that discloses an unimpeachable title he receives the protection of the law, as against unknown and latent defects. Schepp vs. Smith, 35 An. 1; Broussard vs. Broussard, 45 An. 1085.

In Broussard vs. Broussard, referred to, we said that "whatever the secret equities between a vendor and vendee, and whatever their rights between themselves, the former, who has placed upon the public records a title valid on its face, can not urge such equities against a *bona fide* purchaser for value from the vendee, who acted on the faith of such recorded title. This principle applies to married women who, in the exercise of powers conferred by law, have executed apparently valid sales of their paraphernal property."

The law authorizes the wife to sell her paraphernal property and to dispose of the proceeds as she may deem fit. Civil Code 2390; Courtney vs. Davidson, 6 An. 456; Morrow vs. Godchaux, 41 An. 716.

The defendants acquired the notes in suit, paraphed by the notary to identify them with the act of sale retaining the vendor's privilege and special mortgage to secure the same. The mortgage with all its force and vitality accompanies the note in its transfer to an innocent holder. Carpenter vs. Allen, 16 An. 435; Schepp vs. Smith, 35 An. 1; Bank vs. Flathers, 45 An. 75.

The paraph required the holder to look to the registry of the act with which the notes were identified, which has for its object the protection of third parties. This registry of the act of sale executed by Mrs. Bascle informed the defendants that she, a married woman, separate in property from her husband, with his authorization, had sold to one Leveque her paraphernal property, part for cash and the balance on terms of credit, evidenced by the notes in his possession and ownership. There was nothing in the act to put them upon inquiry, or which remotely suggested that the sale was in fact a mortgage executed for the purpose of raising money for the husband's benefit. There was no duty imposed upon them to inquire into what disposition she made of the proceeds of the sale.

The facts mainly relied upon by plaintiff to show that the defendants were not innocent holders of the notes are that the defendants knew that Leveque owned no visible property and would not without collateral security have been credited by defendants; and the continued possession of the property by the vendor, Mrs. Bascle.

Leveque owned no visible property, and may not have had on this account credit in commercial circles. But he was a man of business, a book-keeper in the employ of Levis Brothers, and it is not at all improbable that he may have had sufficient means to purchase the property on the terms and conditions in the act of sale. The fact, therefore, that Leveque was not the owner of visible property, by itself, is not sufficient to charge the defendants with the knowledge that he was an interposed party for the benefit of Levis Brothers, and that the real transaction was intended to be a mortgage and not a *bona fide* sale.

But a party may be interposed for convenience, and the sale a valid one. There may be in such a case a real price and consideration paid by the actual vendee. The defendants may have known that Leveque was an interposed vendee, and that Levis Brothers were the real purchasers, but this would not in our opinion be sufficient to charge them with the secret intentions of the parties to the original act of sale. It was sufficient for the protection of defendants that they found on record a sale apparently valid on its face, sufficient to induce third parties to purchase. Schepp vs. Smith, 35 An. 1; Bank vs. Flathers, 45 An. 75.

If the defendants had notice beyond this, actual or constructive, it must be shown in order to prevent recovery.

The delivery of the property accompanied the public act of sale. Fleckner vs. Grieve, 4 Martin, 694; Laurans vs. Garnier, 10 Robinson, 425; Ellis vs. Provost, 13 La. 235; Flynn vs. Moore, 4 An. 400; Peterkin vs. Oglesby, 30 An. 907; Civil Code 2479.

The continued possession of the vendor, Mrs. Bascle, can not avail her in her demand to have the sale annulled. The sale on this account can only be attacked when third persons have acquired an interest in the property, or the rights of the creditors in the same are asserted.

In such an event, when there is reason to presume that the sale is simulated, its reality must be shown by the parties. Civil Code 2480.

The exception to this rule is when the wife attempts to show the real character of the transaction entered into by which she binds herself for her husband. As in the instant case, between her and the original parties to the act of sale, she would be permitted to prove that she remained in possession of the property to show that the sale was a disguised mortgage.

This she has shown, but has failed to prove that the defendants had any knowledge of the transaction. They are innocent third parties, and as to them the public act of sale placed upon record by the plaintiff must be taken according to its recitals.

As to these parties no question of simulation is at issue between them and plaintiff.

The evidence shows that whatever may have been the intentions of Levis Brothers and Mrs. Bascle as to the sale of the property, and whatever disposition may have been made of the proceeds of the sale, the defendants are the legal holders of the notes in good faith, and without notice of the equities between the parties to the act of sale.

The threats and marital influence alleged to have been exerted by plaintiff's husband are not proved.

Had they been proved, the fact would not assist the plaintiff, as the defendants are innocent holders of the notes. Blanchard vs. Castillo, 19 La. 362.

From the facts and circumstances of this case, we are not disposed to assess general damages.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that it is now ordered that plaintiff's demand be rejected and the injunction dissolved at plaintiff's cost. It is further ordered and decreed that the defendants do have and recover judgment against the plaintiff and the sureties on the injunction bond *in solido* for ten per cent. interest *per annum* on the amount of the judgment enjoined, and special damages for attorney's fees in the sum of one hundred dollars.

Rehearing refused.

No. 11,347.

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SUCCESSION OF LOUISE MARIE REISS, WIFE OF HENRY J. ROLLING, JR.

Plaintiff, the mother-in-law, appeals from a judgment ordering her son-in-law to send his children, aged respectively six and eight years, issue of the marriage with her late daughter, to visit her, and directing further that she shall visit the grandchildren at their father's home in alternate weeks, on such days, as the parties may agree.

She complains of the judgment in so far as she is to visit the children, and asks that it be limited to the imperative duty of the children to visit her. There is very little difference in principle between the parties as disclosed by the evidence.

The husband does not deny the filial piety that is due by the children.

Differences and incompatibilities have arisen shocking to the grandparent and that may prove painful, in course of time, to the children. The question is of first impression in the courts of this State. In France, under similar laws, the courts and commentators greatly differ upon the subject.

There are well considered decisions holding that the precept: Honor thy father and thy mother, as embodied in the Civil Code, includes the grandmother or grandfather as a legal obligation.

Other courts and certain writers lay down the principle that under a law of nature the child is under the authority of the father or mother alone, and that the law has conformed to natural law, and that the judge has no authority to intervene.

The court of the first instance has pronounced judgment based upon the principles that the parties in their testimony admit is correct, but which they have not followed.

APPEAL from the Civil District Court for the Parish of Orleans. *Theard, J.*

A. L. Tissot for Appellant:

These proceedings come before this Honorable Court on an appeal from a judgment, of a mixed character, rendered herein on a rule to compel a father and natural tutor to send his children to visit their grandmother, at such a time as the court might determine, at her residence and domicile.

The evidence shows that for years past the defendant had deprived the plaintiff of the privilege of seeing her grandchildren, or of having access to them. He had no reason for his actions. Mrs. Reiss is a lady of means and refinement. She has a palatial residence on Esplanade avenue, at No. 281, and can there receive and entertain these children, and herself, in the most elegant style. Since a number of years this defendant has been practising the most petty, narrow-minded annoyances directed against his mother-in-law, leading to the belief and conviction that he is animated by no other motive but malice.

The law will not uphold the father in this unaccountable conduct.

The rules governing the paternal authority are to be found in our Civil Code Arts. 216 to 287. In our jurisprudence we have been unable to find any ad-

judicated cases covering our subject. But in the French jurisprudence the question has presented itself, and has been decided in the sense of our contention. As the articles of the Code Napoleon are similar to our own, we may then be permitted to draw light from the French tribunals and commentators.

The articles of the Code Napoleon corresponding with our own are Arts. 371 to 387.

These, like our own, give the father full authority over his children. But is the authority thus conferred absolute, and such as can be wielded arbitrarily, and in the manner attempted by the defendant herein; or is it subject to the control of the court? The question was, at one time, controverted in France, but it is now finally settled in the sense for which we contend herein.

We find an arrêt of the Court of Nancy of May 28, 1868 (Renaud C. Marx), which decides:

La puissance paternelle n'est point absolue, et reste soumise au contrôle des tribunaux, qui peuvent, par exemple, en cas d'interdiction par le père de tous rapports entre ses enfants et leur aieule, autoriser celle-ci à les voir et à correspondre avec eux sous les conditions dont le juge a l'appreciation souveraine. Code Nap. 371, 372, 373.

Pursuing further our study of the question, we come to a decision of greater value and authority than that of these "Cour d'appels" above cited. It is one rendered by the Court of Cassation of 1870. It is there decided:

Le père, seul investi de la plénitude de la puissance paternelle, a le droit d'interdire la visite à ses enfants aux personnes dont l'influence lui semblerait nuisible; mais il ne peut user de ce droit, en ce qui concerne les aieules, que lorsqu'il existe des motifs graves et exceptionnels, dont les tribunaux restent appréciateurs.

En pareil cas, et s'il y a exagération ou abus par le père du droit qui lui appartient, les tribunaux peuvent régler ce qu'exigent, d'une part, l'autorité du père, et de l'autre, l'interêt des enfants, ainsi que la réciprocité des droits et des devoirs établie entre eux et leurs autres ascendants par la loi morale et la loi civile.

In Dalloz and Vergé: Codes annotés, Code Civil, edition of 1873, we find these decisions commented upon, and approvingly cited. Applying them to Art. 273 of the Code Napoleon, which reads: Le père seul exerce cette autorité durant le mariage, the paternal authority, they resume and conclude as follows:

19. Ainsi, bien que le père, seul investi du droit de diriger l'éducation de ses enfants, puisse leur interdire la visite des personnes, même de leur famille, dont il croirait avoir à craindre l'influence, cependant il n'a ce pouvoir, à l'égard des membres de la famille auxquels l'enfant doit honneur et respect en vertu de l'article 371 C. Civ., qu'autant que sa détermination est commandée par d'impérieuses raisons, qui sont soumises au contrôle des tribunaux.

20. Et, spécialement, l'interdiction par le père, de tout rapport entre ses enfants et leurs ascendants (maternels), ne peut être sanctionnée sans examen par les tribunaux, sous prétexte que le père n'a pas à rendre compte des motifs de cette interdiction; c'est aux tribunaux à apprécier, en cas pareil, la légitimité d'un tel usage de la puissance paternelle. D. P. 57. 1. 273. 8 Julliet, 1857.

21. De même, si par des raisons graves et exceptionnelles, il peut appartenir au père d'interdire tout rapport entre ses enfants et leurs ascendants, les tribunaux, en cette matière comme en toute autre, sont investis due droit d'apprécier, s'il y a, de la part du père, usage légitime ou abus du droit de la puissance paternelle. Reg. 12 Juil., 1870; D. P. 71, 1, 218.

22. Ainsi ils peuvent autoriser l'aieul à visiter l'enfant, et même à le recevoir chez lui dans certaines conditions à le faire sortir une fois sur trois sorties ordinaries, et à le garder plusiers jours lors des grandes vacances. Même arrêt.

23. Suivant d'autres arrêts, les droits de la puissance paternelle doivent être conciliés avec le respect et les devoirs de l'enfant envers les aieuls et aieules. Paris, 27 Juin, 1867; D. P. 67, 5, 349; Nancy, 28 Mai, 1868; D. P. 68, 2, 176.

24. Ainsi, en cas de prédécés de la mère et de nouveau mariage du père, l'aieule maternelle peut être autorisée à visiter son petit-fils dans la maison d'éducation où son père l'a placé, et même à le faire sortir à des jours déterminés, dans une juste mesure qu'il appartient aux tribunaux de fixer. Même arrêt du 27 Juin, 1867.

25. Pareillement, il appartient aux tribunaux, alors que le père a prohibé d'une manière absolue toute visite d'une aieule maternelle à son petit-fils, et interdit toute correspondance entre eux, d'autoriser cette visite et cette correspondance, sous telles conditions qu'ils jugent utiles à l'intérêt de l'enfant. Arrêt précité du 28 Mai, 1868.

26. Jugé encore que le pére ne peut faire résulter de la puissance paternelle dont il est investi le droit d'empêcher, sans motifs légitimes, l'aieul de recevoir son enfant, par exemple, après la dissolution du mariage, un aieul maternel de visiter cet enfant, et même de le faire sortir, à des jours et dans une mesure determinés par les juges, de la maison d'éducation où le père l'a placé. Ainsi l'aieul peut être autorisé à garder l'enfant chez lui pendant une partie des vacances, alors, notamment, que l'éloignement de son domicile ne lui permet pas de ramener cet enfant chaque soir chez son pére. Paris 14 Août, 1869; D. P. 69, 2, 238.

We have followed up the "jurisprudence générale" of Dalloz to the year 1882, and can find no more adjudicated cases than those above cited, for the reason, doubtless, that the jurisprudence of France is considered as settled by the above cases.

Laurent is of a different opinion. He refers to the decisions cited above and criticises them. But his opinion, howsoever valuable, can not overturn the constant jurisprudence which carries an executory sanction. F. Laurent, Droit Civil Français, Vol. 4, pp. 360 *et seq.*, Nos. 268 *et seq.*

Bernard McCloskey for Appellant:

There is no law in this State which directly or indirectly gives to grandparents the right to interfere between father and child. Civil Code, Art. 217, etc.; Laurent, Vol. 4, p. 316.

The court will not interfere in the exercise of the authority and discretion vested in the father, after the death of his wife, as to whom the children should visit.

The paternal power, as known to our laws, is traceable to the Roman Law—which based the power upon the principle that every family was, and of right ought to be, one body, with one will and one executive. Hadley, Lectures on Roman Law, 105, 122.

The opinion of the court was delivered by

BREAUX, J. The father and tutor of two minor children, one eight and the other six years of age, is defendant in a rule issued at the instance of their maternal grandmother to compel him to send his

children to visit her, at her residence and domicil, on such days and at such hours as the court may deem proper to determine.

She alleges that he arbitrarily, wantonly, maliciously and cruelly denies her the privilege of seeing her grandchildren, thus abusing parental authority, controllable by the courts.

The defendant denies that he has refused to mover in rule the privilege of visiting his children, and avers that he is willing that she shall visit his children.

The judgment of the court *a qua* makes the rule absolute and orders the father to send the children to visit their grandmother, and further orders that the grandmother shall visit the children at their father's home in alternate weeks on such days as the parties may agree, provided the visits do not in any manner interfere with the schooling of the children.

Before this court the appellant asks that her rule be made absolute, commanding the defendant to send the children to visit her without reference to any visit by her.

The appellee, in his answer to the appeal, prays for a dismissal of the rule.

The mother of these children has been dead about six years.

They live with the father.

The relations between the son-in-law and mother-in-law are not only strained but acrimonious.

More than three years have elapsed since he has sent his children to visit their grandmother.

She has requested him, she testifies, to send them, but he failed to comply with the request.

The defendant's household consists of his father and other members of his family. They and these children live at the same residence.

The relations of plaintiff with the members of the son-in-law's family are not, it seems, of the most pleasant character.

The plaintiff by her testimony creates the impression that the coolness and feeling existing would render the visit anything but pleasant.

Moments with her grandchildren while on such visits which, under other circumstances, would be highly enjoyed, at this time would possibly only cause irritation and bad blood.

Their differences are, we are led to believe, of an entirely personal

character and have no reference to the standing of the parties, in regard to which there is not the most remote suggestion.

The plaintiff states as a witness that she does not entertain any objection on that score.

The witness testifies:

Q. "Have you visited those children at the house of their father?"

A. "No sir."

Q. "Why not?"

A. "Why not! Because I thought that they should be sent to see me, and not to go there and see them."

Q. "Why not call upon these children at the home of their father to see them?"

A. "Because I thought it was proper to send them to me."

Q. "Is that the only reason?"

A. "That is my reason that I wish to give."

Q. "Do I understand you, then, as refusing to visit those children at the home of their father?"

A. "No sir; I don't refuse, but I have other reasons. I may be wrong, but at the same time I have never visited the Rolling family, and I didn't think it was my place to go to see those children there, as I think their place was to come to see me."

When examined as a witness the son-in-law, in answer to the question:

Q. "Don't you think that there is a law of nature that children should visit their grandparents?"

Answer. "I think that's right."

Manifestly the difference between these parties is inconsiderable, and would not be sufficient to arrest attention, were it not that it affects the good relation and intimacy that should prevail between these little children and their grandmother.

While we appreciate the affection that moves her to seek the occasional company of the offspring of her daughter, this court's jurisdiction does not include the cause pleaded.

The issue is not incidental to any other cause.

However disinclined we are to discountenance causes of action such as the one under consideration—for they are inspired by a true and commendable impulse—we find no authority in law to entertain jurisdiction of the issue presented. The question involved is *res nova* in this State.

In interpreting articles of the Civil Code in France, similar to ours on the subject, the courts and commentators greatly differ. There is respectable authority listed in favor of the precepts of Deuteronomy, *Honora patrem tuum et matrem*, embodied in the Civil Code as including also the grandfather and the grandmother.

They construe, under the articles of the Code, that the obligation involved in the case at bar, legal in so far as relates to the father and mother, is legal also in so far as relates to the grandfather and the grandmother, and that the court can intervene for its enforcement without regard to the will of the father or mother.

Other courts hold and other commentators emphatically state that, under the law of nature, the child is under the authority of the father or mother, after the death of either.

We translate from Laurent, Vol. 4, p. 862, who propounds the question:

Can the ascendant demand that the authority of the father and mother be limited?

In truth, the ascendants have certain rights that the law, in accord with nature, gives them, but only when the father and mother are dead or are incapable of manifesting their will; during the existence of the father and mother the law, properly, accords them no authority over the children.

To permit them to intervene would occasion embarrassment and annoyance; even more; it would injuriously hinder proper paternal authority by dividing it.

The authority sought is said to be in the interest of the children.

Are the children interested in anything in the nature of a conflict of authority? Without doubt it is desirable that the ties of affection that nature creates between the ascendants and their grandchildren be strengthened and not unceasing, but, if there is a conflict, the father alone or the mother should be the judge.

The law gives no right of action to the grandparents.

The father may have good reasons to avoid all contact between his children and their grandparents, either that he fears that they may inculcate bad principles or that they will unsettle the respect and affection due him.

He owes no account to any one of his motives; they may be so intimate that the honor of the family requires that they shall remain a secret.

Shall we say that the judge shall be the arbitrator between the grandparent and the father?

The court of Bordeaux replies that the intervention of the tribunals would, as a consequence, render the discussions of the family more pronounced by delivering them to the public.

Other views than those above expressed, says the commentator would be proper on the part of the legislator—we do not understand them when emanating from interpreters of the present laws.

We refer approvingly to the French authorities only in so far as they lay down the principles that there is not a *vinculum juris*. That the obligation ordinarily to visit grandparents is moral and not legal.

There may be cases of downright wrong and inhumanity demanding judicial intervention, even to the extent of dismissing the father and tutor from his trust.

The case at bar does not disclose so grave an issue.

Ill feeling and bad blood separate the father and grandmother.

The former admits the respect due to the latter by his children.

The ties of nature will prove more efficacious in restoring kindly family relations than the coercive measures which must follow judicial intervention.

It is, therefore, ordered, adjudged and decreed that the judgment of the court *a qua* be annulled and avoided, and that the rule be dismissed at plaintiff's costs in both courts.

Rehearing refused.

No. 11,353.

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SUCCESSION OF HARRIET R. HOOKE, WIFE OF JOSEPH H. ASHBEY.

Where a matrimonial community of acquets and gains exists and the wife dies and her succession is opened by the qualification of the husband as natural tutor of his minor children issue of his marriage with the decedent, a creditor who has obtained a judgment on a community debt can not compel an administration of the wife's succession. His remedy is to proceed against the surviving husband and the community property.

APPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

J. Zach. Spearing Attorney for Opponents and Tutor, Appellees:

The holder of a judgment or claim against the husband can not claim the amount of same from, and is not by virtue thereof a creditor of, the succession of the deceased wife. R. C. C. 2398; Succession Clark, 27 An. 269, 270; Reihl vs. Martin 29 An. 16; Succession of Bofenschem, 29 An. 714.

A person who is not a creditor of a succession, and has no interest therein, can not cause the appointment of an administrator to the same. Succession Poret, 26 An. 158; Succession Story, 3 An. 502; Succession Walker, 32 An. 321; Succession Hebert, 33 An. 1099; Succession Sarrazin, 34 An. 1168; Soye vs. Price, 30 An. 98.

The beneficiary heir, present and of age, is preferred in the appointment as administrator, where one is necessary; on his default, the natural tutor of the minor heir will be preferred, R. C. C. 1042, 1044, 1046, 1121; Succession Romero, 42 An. 896, 897; Succession Sloane, 12 An. 610, 611; Succession Sutton, 20 An. 150, 151; Succession Daigle, 27 An. 524, 525.

J. S. Whitaker and *Ernest T. Florance* Attorneys for Appellees:

Where the succession of a wife owns community property and has been accepted under benefit of inventory, but no administrator has been appointed thereto, a creditor of said community can compel the appointment of an administrator. C. C. 1041.

The succession of a wife owns her share of the community property, encumbered with the community debts. 36 An. 454, Dickson vs. Dickson; 32 An. 852, Tugwel vs. Tugwell.

The opinion of the court was delivered by

PARLANGE, J. Harriet R. Hooke, wife of Joseph H. Ashbey, died in 1884. A matrimonial community of acquets and gains had existed between her and her husband, who is still surviving. Shortly after her death, her husband, alleging that his wife had died intestate, leaving both separate and community property, obtained from the Civil District Court for the parish of Orleans, an order for the taking of an inventory of the property left by the decedent; he was appointed and he qualified as the natural tutor of his three minor children, issue of his marriage with the decedent. An under-tutor was also appointed and qualified. The inventory amounted to $12,456.15½, the interest of the decedent in the community property being valued at $1869.37½ and her separate property at $10,586.78.

In 1885, Mary J. Ashbey, as natural tutrix of her minor children, obtained a judgment in said Civil District Court against Joseph H. Ashbey, on a balance of account for $5437.92 and interest, which account Joseph H. Ashbey had rendered Mary J. Ashbey prior to

the death of the wife of Joseph H. Ashbey and which account constituted a community debt.

In 1893, James H. Ashley filed a petition in the succession of Harriet R. Hooke, wife of Joseph H. Ashbey, alleging that Joseph H. Ashbey, since his appointment as natural tutor of his children and since the taking of the inventory, has taken no action whatever in said succession; that the same remains unsettled; that Joseph H. Ashbey refuses to either settle or acknowledge claims against said succession; that he refuses to represent the same; that the petitioner is a creditor of the same and prays to be appointed administrator.

The application is opposed by Mary Ashbey, one of the heirs now of age of the deceased wife of Joseph H. Ashbey and by the latter as natural tutor of one of his children, for the reasons that the application is not properly made or filed according to law; that James H. Ashbey is not a creditor of the succession and has no right and is not a proper person to be appointed administrator; and that the succession owes no debts, and the appointment of an administrator is unnecessary.

The opponent, Joseph H. Ashbey, prayed in the alternative to be appointed administrator in case petitioner's application should not be rejected.

On the trial of the matter, James H. Ashbey offered in evidence the judgment rendered against Joseph H. Ashbey in 1885 and also the account upon which that judgment was based. James H. Ashbey also offered a judgment of said Civil District Court rendered in 1893 in the succession of one James H. Ashbey recognizing and putting in possession his sole heirs, among whom is James H. Ashbey, the party to the instant case. We understand that the claim of the latter to be a creditor of the present succession is founded on the fact that the judgment against Joseph H. Ashbey belonged to the succession of one James H. Ashbey, of whom the James H. Ashbey, party to the instant case, is one of the heirs.

The lower judge rendered judgment ordering an administration, and he appointed Joseph H. Ashbey the administrator. The opponents have appealed.

In our opinion the judge *a quo* erred. Under the circumstances of this case he should not have ordered an administration. It is settled that notwithstanding the actual dissolution of a matrimonial com-

munity of acquets and gains by the demise of one of the spouses, it has a fictitious existence subsequently for the purposes of liquidation and payment of community debts. Succession of Dumestre, 41 An. 411; Factors and Traders' Insurance Company vs. Levi *et al.*, 41 An. 434; Landreaux *et al.* vs. Louque, 43 An. 234, and cases therein cited; Succession of Cason, 32 An. 792.

The judgment being a conceded community debt, we see nothing to prevent its owner or owners from proceeding against Joseph H. Ashbey, who was the head of the community, and against the community property, for the satisfaction of the judgment.

It is therefore ordered that the judgment appealed from be annulled, reversed and set aside, and that the application of James H. Ashbey for an administration of the succession of Harriet R. Hooke, deceased wife of Joseph H. Ashbey, be and the same is hereby rejected and dismissed at the cost of said James H. Ashbey in both courts.

Rehearing refused.

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No. 11,478.

The Parish of Concordia vs. S. R. Bertron.

Police juries have the capacity to buy the property of delinquent tax collectors seized, sold and adjudicated at sheriff's sale under the judgment and execution of the jury against the delinquent. Const., Art. 118; R. S., Secs. 3321, 351, 354; 2 H. D. 1157, No. 1, *et seq.*

To divest the title of the owner, the adjudication of his property for taxes must be preceded by notice to him. Const., Art. 210; 30 An. 871; 43 An. 726, 427.

The prescription of three years will not avail the adjudicatee at the tax sale or those claiming under him, when no such notice has been given the owner. *Ibid.*

APPEAL from the Eighth District Court, Parish of Concordia.
Boatner, J. ad hoc.

Lazarus, Moore & Luce Attorneys for Plaintiff and Appellee:

Police juries are authorized to employ counsel other than the district attorney. 24 An. 145; 28 An. 455.

Parishes have power to purchase and own real estate. C. C. 433.

Parishes have the inherent and incidental powers to carry out the powers expressly granted. 2 Dillon's Municipal Corporation, Secs. 561 562; Parish vs. Eager, 15 Wis. 590.

Defendant is estopped from denying the title of plaintiff, having acquired title through the plaintiff, in tax proceedings against the plaintiff as owner.

The tax title of defendant, being without the notice prescribed by law, is absolutely illegal. 30 An. 971; 32 An. 226; 33 An. 291, 529; 43 An. 426; 44 An. 909.

A judicial sale can not be avoided without showing injury. 31 An. 689; 6 An. 61; 12 An. 271.

In a petitory action, plaintiff can recover against a naked possessor on an apparent title; and it is not necessary to make out a title good against the world. 8 La. 246; 10 An. 540; 15 An. 454; 28 An. 274.

The State can be estopped. 28 An. 121; 26 An. 460; 34 An. 859; 29 Mo. 543.

Elam & Dale Attorneys for Defendant, Appellant:

Parishes, like counties in other States, are involuntary political or civil divisions of the State, designed to aid in the administration of government as State auxiliaries or functionaries, possessing no other powers than those delegated, ranking low down in the scale of corporate existence, and well distinguished from municipal corporations proper, which are vested with more extensive powers, and endowed with more important functions, and a larger measure of public life. As a rule they can not acquire real estate, unless for public utility, and can not dispose of the same, after it has been acquired and devoted to public service without legislative authority. They may, however, be the object of public and private bounty in the absence of disabling or restraining statutes. * * * They have no life, no attribute, no power, no rights, no obligation, but such as have been conferred or imposed upon them. Parish vs. Gaddis, 34 An. 931.

Clinton & Garrett Attorneys for Warrantor, Appellant:

The parish was incapable of acquiring or holding the immovable property, as the same was not acquired for public purposes under legislative authority, either express or distinctly implied. See Cooley on Const. Lim., 6th Ed., p. 294 *et seq.*; Dillon on Municipal Corporations, Sec. 10; 32 An. 624-627; Am. and Eng. Ency. of Law, Vol. 15, p. 1057 *et seq.* and notes thereunder; also Vol. 4, p. 348 *et seq.* and notes.

A municipal corporation has no authority to purchase land at an execution sale upon a judgment obtained on an official bond. See Williams vs. Lash, 8 Minn. Reports, 496.

The defendant and warrantor acquired all the rights of the State, and the estoppel, invoked by plaintiff, can not apply, for the reason that the State is the sovereign and the parish simply an agent for the performance of certain public functions.

Defendant in possession claiming title has the right to require plaintiff not only to show a better title than his own, but a title as good as any the latter can oppose to him, whether invested in defendant or not. See Font vs. McConnell, 46 An. 215.

The vendee in case of eviction can not recover from the warrantor fees paid by him to counsel for asserting his rights in court. 19 La. 357. The contrary doctrine was laid down in 2 An. 868, but overruled expressly in 13 An. 499; 14 An. 311, 757, 826; also in 15 An. 517.

The opinion of the court was delivered by

MILLER, J. The plaintiff, the parish of Concordia, instituted the petitory action to recover certain lands. The title of the plaintiff is derived from the sale of the lands under execution of the judgment of the parish against P. W. Chase, at which sale the parish became the adjudicatee. When the sheriff's sale was made the lands were assessed for taxation for the year 1888 against P. W. Chase, and on the 4th of May, 1889, were adjudicated to the State by the tax collector, the basis of the adjudication being the assessment for the year 1888. Thereafter, the lands were listed to the Board of Commissioners of the Fifth Levee District, the list being recorded on the 24th of April, 1891, in the office of the clerk of the court and *ex officio* Recorder of Concordia. Act No. 44 of 1886, Sec. 11. The Levee Board conveyed the lands to S. R. Bertron, the defendant, on the 15th of December, 1891, the conveyance embracing the lands in controversy, as well as all lands in Concordia acquired by the board under the Act No. 44 of 1886. The defendant asserts title under the conveyance of the board, avers the parish is estopped from disputing his title, because, subsequent to his purchase, the parish authorities assessed taxes against him on the property; that the parish itself has no title, because incapable of acquiring the property; pleads the prescription of one, three and five years, and finally calls in warranty the Levee Board, and in the event of eviction, claiming judgment against the board for the price paid and the amount of certain taxes alleged to have been paid by the defendant for the years 1880 to 1892. The Levee Board, answering the call in warranty, specially deny any liability for counsel fees claimed by defendant in the event of eviction, and adopt his defences. The judgment of the lower court was in favor of plaintiff against defendant for the land, and in favor of defendant against the warrantor for the price, reserving the question of taxes paid. The appeal is by defendant and his warrantor.

The main defence in this court is the asserted incapacity of the plaintiff to acquire the property at the sheriff's sale. That sale was to satisfy the judgment of the parish against Chase for parish taxes collected by him as sheriff and *ex officio* tax collector, and for which he had not accounted. Defendant's argument supposes the parish can not acquire property at a sheriff's sale made to satisfy the judgment of the parish against the delinquent tax collector. The prop-

erty of the debtor is the common pledge of his creditors. It is the right of the creditor to recover judgment against his debtor, issue execution and subject his property to sale for satisfaction of the judgment. The plaintiff in execution under the general rule certainly can buy the property at the execution sale, if to protect his interest he chooses to purchase. The purchase is a mode of satisfying the judgment. On what ground is a parochial corporation to be excluded, when a judgment creditor, from the right to purchase the debtor's property, accorded by law to the seizing creditor? The theory of the defendant and warrantor seems to be that the purchase of property by the police jury at the sheriff's sale made under execution against its debtor is forbidden by law and public policy.

The competency of the police jury, created for purposes of parochial government, to acquire property without any restrictions may well be doubted. That general question is not involved in this case. The purpose of the purchase in this case was to restore to the parish the funds derived from its taxes, not accounted for by the tax collector. Such purchases affirm no capacity of the jury to purchase property generally, and hence contravene no public policy. They suppose only, that the parish may realize funds diverted from its coffers by the delinquent tax collector, and for that purpose may, if necessary, purchase his property at the sheriff's sale under the execution of the parish. This theory, that assails the capacity of the parish to purchase at the execution sale, would, it is presumed, equally deny that the property if tendered by the debtor in satisfaction of his debt, could be received by the parish.

The view we have expressed of the right of the parish to purchase under its execution, sufficiently obvious, it would seem, finds confirmation in our statutes authorizing bonds of tax collectors and suits by police juries on these bonds. It is difficult to appreciate why the jury, authorized to sue, recover judgment and issue execution' should not have the right to buy at the sheriff's sale when necessary to make that execution effective. State Constitution, Art. 118; R. S., Secs. 3321, 351, 354; 2 H. D., p. 1557, No. 1, *et seq.* It is urged in defendant's brief that the Supreme Court of Minnesota, under a statute authorizing a county to purchase lands for public uses, held that the county can not buy property at an execution sale to satisfy a judgment on an official bond. The statute is restrictive of any capacity to purchase except for public uses. The limitation of such

legislation doubtless, exerted its influence in the Minnesota decision. We have no such statute, and the power of the parish to buy in this case, we think, is implied by the laws defining the functions and powers of police juries.

The defendant and warrantor rely on the defendant's tax title—*i. e.*, the adjudication of the property to the State for the taxes of 1888, the listing of the lands to the Levee Board and the conveyance of the board to defendant.

The parish was owner when that tax adjudication was made. It is in proof no notice was given to the parish of that adjudication as required by the Constitution, and notice under our jurisprudence is essential to divest the title of the owner. Constitution, Art. 210; Bank vs. Lannes, 30 An. 871; Smith vs. City, 43 An. 726; Breaux vs. Negrotto, *Ibid.*, p. 427. There is an allusion in the brief for defendant and warrantor to the prescription of three years. This prescription is of no avail in a case like this, and besides the tax adjudication was in 1889, and this suit was filed in 1891. In the brief of defendant it is said, this suit, petitory in its character, should not have been brought against defendant. The suit to try title is properly directed against defendant asserting title. Again, it is urged by defendant that in this action plaintiff must show title better than any that can be opposed to him. We think plaintiff has met this requirement. We have thus disposed of the defences urged in this court, and as to other points in the answer nothing need be said.

The defendant asks for the affirmance of the judgment in his favor against the warrantor for the price paid by defendant. The warrantor insists only that he should not pay counsel fees. As to the restitution of the price there is no question (Civil Code, Art. 2506), and that is all the judgment against the warrantor awards.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed, with costs against the appellants.

No. 11,478.

EDWARDS & KURZ VS. PLAQUEMINE ICE AND COLD STORAGE COMPANY.

The purchaser sued for the price is entitled, notwithstanding the prescription of the action *quanti minores*, to claim a reduction of the price for defects in the thing sold. Civil Code, Arts. 2541, 2544; 1 N. S. 468; 2 An. 546.

Edwards & Kurz vs. Cold Storage Company.

When a machine stipulated to be furnished is delivered to the party bound to receive and pay for it, who, after a fair opportunity for examination and trial of the machine, promises payment of the price with conditions afterward waived by him, in the suit brought to compel that payment, the burden of proof will be on the defendant to prove the defects in the machine alleged to exist.

APPEAL from the Fourteenth District Court, Parish of Iberville. *Talbot, J.*

J. Armstrong and *D. H. Cross* for Edwards & Kurz, Assignees; *Frank McGloin* Attorney for Moore & Knight, Appellees:

The evidence shows full compliance with the contract.

Defendant can not claim more than specified in resolution of May 21, 1891, which was carried out.

Defendant having operated plant for eighteen months, burden of proof is upon it to show defective character of machinery and fair usage in its hands. 40 An. 112 Whitney Iron Works vs. Reuss.

Defendant having accepted partial delivery can not subsequently complain that the goods were not in conformity with contract. 38 An. 773, Enders vs. Gingres.

A party accepting work done and expressing satisfaction is estopped from claiming damages for violation of contract. 36 An. 820, DeLambre vs. Williams; 38 An. 573, Shakespeare vs. Ware.

Residents of the parish of Orleans can not be cited in reconvention in the parish of Iberville in a suit brought by their assignees in the court of the latter parish. C. P. 162; 24 An. 513; 28 An. 255; 21 An. 268; 21 An. 550.

The demand in redhibition, or for reduction or restoration of price, is prescribed by one year. C. C. 2534, 2544.

A demand in reconvention is not an exception within the meaning of the maxim "*Quæ temporalia sunt*," etc. 2 An. 546; 3 An. 141; 12 An. 297; 13 An. 249.

Kernan & Laycock and *Alex. Hebert* Attorneys for Defendants, Appellants:

A suspensive condition in a contract suspends the right of action until the event happens, or the thing to be performed takes place. C. C. 2023, 2038; 15 An. 647.

Where there is fraud on the part of the vendor, or obligor, the action *quanti minoris* or the redhibitory action is not prescribed by one year. C. C., Art. 2512; 15 An. 297; C. C. 2544; 14 An. 401.

A vendee may avail himself of a deficiency in the quantity of the thing sold, though the action *quanti minoris* be prescribed. He may use as a shield what he no longer can employ as a weapon. 3 N. S. 695; 4 N. S. 500; 2 La. 886; 4 R. 155; 9 R. 101; 1 An. 404; 6 An. 29; 12 An. 297; 17 An. 269; 18 An. 118; 20 An. 407; 14 An. 184.

In an exception of no cause of action the averment of the reconventional demand was taken as true. 14 La. 421; 12 An. 190; 13 An. 188, 177, 205; 14 An. 187.

The opinion of the court was delivered by

MILLER, J. The plaintiffs, as assignees of John S. Moore and C. W. Knight, brought suit in the lower court to recover the balance claimed to be due by the defendant company on a contract of Moore & Knight to deliver and erect an ice manufacturing machine with all fittings and appurtenances. The defendant excepted that by the terms of the contract no suit could be brought until the manufacture of ice had commenced, and it was proven that the machine could manufacture ten tons of ice daily, the exception insisting the machine had never demonstrated this capacity. The defendant answered, denying that the assignors of plaintiffs had fulfilled their contract, averring that the machine furnished was defective, not adapted to the purpose, nor according to the contract, that by reason of these defects defendants were entitled to four thousand seven hundred and ten dollars, for which defendants claimed judgment in reconvention against the assignors residents of New Orleans. The assignors pleaded their domicile to the reconventional demand against them in the 14th Judicial District Court of Iberville. The exception was sustained, and from that judgment there is no appeal. This eliminates the reconventional demand from consideration. The judgment of the lower court was in favor of plaintiffs and defendants appeal.

The defendants' contention is well founded, that the plaintiffs, as assignees of Moore & Knight, are subject to all defences against the assignors. Nor are the defences of defendants precluded by the prescription pleaded by plaintiffs of one year applicable to the action *quanti minores*, for the purchaser sued for the price may always claim a reduction for defects in the thing sold. Civil Code, Arts. 2541, 2544; Thompson vs. Melbourne, 1 N. S. 468; Girod vs. Creditors, 2 An. 546.

The appeal submits the issue of fact: whether the ice machine was delivered and erected by Moore & Knight in accordance with their contract. The answer and the testimony of defendants undertakes to maintain that the ice machine in all its parts was defective and unfitted for the purpose of the contract. The boiler, it is contended, was not of the capacity —*i. e.*, 50 horse-power stipulated, and it is charged that the generator, absorber, ammonia well, condenser, exchanger, valves and other appurtenances were each and all defective. The witnesses for the defence are the engineer of the de-

fendant, and an expert who never saw the machine in operation and testifies some months after its erection. These witnesses insist that there is but one test to determine the capacity of a boiler, and that test is against this boiler. On this point the testimony is at variance with that of four witnesses of plaintiff, three of whom are connected with foundries in this city. The conclusion from their testimony is, that the measurements of the different parts of a boiler are generally accepted as indicating the capacity of the boiler. There is also produced the catalogues, as they are called, of five leading manufacturers or dealers in boilers. It appears that the dimensions of boilers given in these catalogues as those of 50 horse-power conform to that furnished under the contract. Again, it appears the boiler was bought from the Nagle Company for $1172, 1 per cent. off. The expert of defendants testifies the boiler was diminished in value to the extent of $1000. This would make the boiler worthless. If this expert testimony is accepted, then the Nagle Company received and Moore & Knight paid over $1100 for a comparatively worthless boiler. It seems to us that defendants' testimony on this branch of the case proves too much, and that of defendants must prevail. As to the generator, absorber, valves and other appurtenances, in all of which defendants' testimony points out serious defects, there is opposed to defendants' witnesses the testimony of those who constructed for the contractor these portions of the machine. The plaintiff's witnesses testify that these parts of the machine were of the best material and workmanship. This testimony, based on personal knowledge and from disinterested persons, is entitled to great weight and outweighs, in our opinion, that of defendants' engineer and of the expert, who mingles with his testimony statements which appear to be based on information given to him. We think on this branch of the case the defence fails. As to the actual workings of the machine, the engineer testifies it failed to turn out the required quantity of ice. On the other hand, the testimony of one of the contractors who operated the machine for about sixty days after it was erected, is that its capacity to manufacture the quantity stipulated was fully demonstrated. He testifies there were some defects developed incident to new machinery and of no importance. Besides the engineer, defendants called an assistant connected with the working of the machine. He points out but one defect, and that of a trifling character. In this condition of

the record it can not be said that defendants have supported their case as to the actual working of the machinery. But it was arranged between defendants and the contractors there should be a test of the machine, and to this effect there was a resolution of the company, if not written by one of the contractors, was at least fully assented to by him and must be accepted as manifesting his entire confidence in the result of the test. There was some delay after this resolution was passed, but the defendant was not pressing for the test, and finally the contractors sent up a person to make it. On his application the company answered the machine was not working, and on this account the test proffered to the company was declined; nor does it appear the test was ever afterward sought or denied by defendant. Thus matters remained until the works were destroyed by fire. Payment being refused, this suit was brought for the balance due on the contract.

The rule so often applied in this class of cases, that acceptance of the work of the contractor binds the owner, or at least creates a presumption in favor of the contractor, is reasonable. This machine was erected and put in operation early in April, 1891. On May 21, 1891, the company adopted the resolution to the effect that if certain enumerated articles were furnished by the contractors and the test made of the machine that the company would pay. This was certainly a qualified acceptance of the machine. The articles then required to supply alleged defects, it is proved, were of value little over $100. It is utterly impossible, in our opinion, to reconcile this qualified acceptance with the existence of the serious defects to which the defendants' engineer and expert undertake, months after, to testify. If any such defects existed, as that testimony undertakes to support—*i. e.*, a worthless boiler and appurtenances, grossly defective in workmanship and material, the machine would, in our opinion, have been rejected and payments utterly refused. Instead payments on account were made, and the work accepted with the qualifications only specified in the resolutions of the company. The significance of this action against the company is made more impressive. The contractors sent up a portion of the articles specified in the resolution. These articles were never removed from the warehouse, and the company avowed it would not have received the residue of the articles called for by their resolution. As to the test proffered by the contractors, that was in effect refused. Weight is

due to the judgment of the lower court in a case like this. It was in favor of plaintiff, and we think the record shows no basis to reverse it.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed at the costs of appellant.

No. 11,446.

THE STATE EX REL. D'AMICO & SIDOTTI VS. THE JUDGE OF THE FIRST CITY COURT.

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52 987

A *mandamus* to compel the inferior court to hear witnesses to confirm a default will not issue when, since the application of plaintiff to confirm the default, the defendant in the lower court has filed his answer.

In proceedings before the City Courts no default preliminary to judgment against defendant is required. Code of Practice, Arts. 582, 588.

Nor can these courts by their rules require such default.

The writs under Art. 90 of the Constitution will not issue when it is apparent they can serve no purpose.

APPLICATION for *Mandamus*.

Branch K. Miller Attorney for Relator:

Preliminary defaults need not be taken before justice of the peace courts, as is done before district courts.

Defaults and delays in the city courts are provided for by Arts. 1084 and 1055, C. P., and do not include preliminary defaults required before the district courts. Sec. 7, Act 45 of 1880 43 An. *et seq.* 177; 39 An. 990 *et seq.*; 37 An. 844.

William C. Dufour for the Responde t.

The opinion of the court was delivered by

MILLER, J. This is an application for a writ of *mandamus* to direct the judge of the First City Court to hear witnesses to prove plaintiff's demand in the suit of D'Amico *et al.* vs. Canuza. The complaint of relator here, the plaintiff in the lower court, is, that the judge refused to hear the witnesses, on the ground that no default had then been taken. The answer of the respondent judge is, that the rules of the court required a default to be taken before the proof could be administered, and under the rules three days after default before confirmation of the judgment; and he further

shows that defendant in the suit has, since the application of plantiff to prove his demand, filed his answer, and it is now too late to hear witnesses and render judgment as of date January 9, the date of plaintiff's application.

There is no power in this court to order the withdrawal of the answer of defendant filed in the lower court. The relator here, will necessarily have to fix the case for trial and prove the demand. It would, therefore, accomplish no purpose were we to hold that the respondent judge should have heard the plaintiff's witnesses when he offered them.

The writ is therefore refused at relator's cost.

ON APPLICATION FOR REHEARING.

On the application for a rehearing it is urged that in proceedings before the city courts the law provides for no defaults preliminary to final judgments, and hence it is insisted that our decision should have required the lower court to receive and act on the testimony tendered by the relator in proof of his demand, and declined to be received because there was no default.

It seems that the city courts have adopted a rule requiring defaults before judgments. But these rules must conform to the express law governing the proceedings before these courts. The law requires the defendant in suits before the city courts to answer the demand the day after service of citation. If he fail to answer, there is no provision for any default, and in our opinion the rules in these courts can not exact such default to be taken. It is the duty of the court, if defendant fail to appear, to receive the proof of plaintiff's demand and decide the case. We could in any proper case, compel by *mandamus* the performance of this duty. But the defendant may answer at any time, if judgment has not been rendered against him. In this case, the answer of the respondent judge brings to our notice that since he declined to receive plaintiff's testimony, the defendant has answered. This in our opinion requires that the case be fixed for trial, and the hearing on the day of trial of the witnesses for both parties. The *mandamus*, therefore, can not issue to compel the court to hear and act upon plaintiff's testimony in support of his demand, when, by filing his answer after the hearing of this testimony was refused, the defendant has acquired the right to have the case fixed and his witnesses heard. While the court recognizes that plaintiff's wit-

nesses should have been heard when tendered and judgment then pronounced, still in the present posture of the case—*i. e.*, the defendant having since answered, we can not issue the *mandamus* that would have been granted but for that answer, of which we are informed in the reply of the respondent judge.

No. 11,450.

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123 157

EMMA S. MAJOR VS. HER CREDITORS.

In legal contemplation there is no debt of the tutor to the minor until the end of the tutorship and settlement of the tutor's account. Hence, at a meeting of creditors of the tutor to elect a syndic, his vote can not be received based on the supposed debt to the minor, the tutorship still subsisting and there having been no settlement of accounts, and the law exacting that the debt on which the creditor votes at such meeting be fixed and certain. Revised Statutes, Sec. 1796; C. C., Art. 3086; 6 La. 462; 38 An. 15; 6 An. 224.

Nor, in another view, can the tutor vote at such meeting on a supposed debt due by himself individually to himself as tutor. He can not, as tutor, act against or sue himself individually. It the interests of the minor are at all concerned at the meeting of the creditors of the tutor, it is for the under-tutors to act for the minors. C. C., Art. 275; 12 An. 361; 29 An. 531.

It is contrary to the spirit of our law for the protection of minors, that the tutor seeking a discharge from his debts should subject the minors to the operation of the insolvent laws, so as to affect their rights against him, least of all to cancel their mortgage against him, under the section of our insolvent laws directing the erasure of mortgages. Hence, the tutor can not, in our view, bring the minors before the meeting of the creditors by assuming to vote for them. C. C. Art. 3314; 33 An. 49; 29 An. 531; 31 An. 217; 12 An. 361.

APPEAL from the Fourteenth District Court, Parish of Pointe Coupee. *Talbot, J.*

O. O. & A. Provosty Attorneys for Opponents and Appellants:

1. The under-tutor, and not the tutor, has the mandate from the law to represent the minors at the meeting of creditors held to elect a syndic for the insolvency of the tutor.
2. The effect of making minors parties to the proceedings of the insolvency of their tutor would be to enforce their claims against their tutor pending the tutorship and to authorize the erasure of their mortgage on the property of the tutor sold in the course of the insolvency proceedings; and as this effect can not be sanctioned, the conclusion must be adopted that minors can not be made parties to the proceedings of the insolvency of their tutor, except under special circumstances and by means of special proceedings. Gibbs vs. Lum & Co., 29 An. 531; Schneider vs. Burns, 45 An. 875; Life Association vs. Hall, 33 An. 49.

8. The claims of a minor against his tutor can not, pending the tutorship, be made the basis of a vote at the meeting of creditors held to elect a syndic for the insolvency of the tutor; but, if they can, they must first be liquidated by a judgment, and be so liquidated with special reference to the insolvency. A *pro forma*, irregular liquidation of six months back, had in another connection, will not suffice. 38 An. 17, 510; 12 M. 157; 6 La. 462; 7 An. 624; 29 An. 526; 34 An. 30, 418, 984; 32 An. 457; 2 Rob. 415; 38 An. 595; 31 An. 217.

L. B. Claiborne and *M. Tacon Hewes* Attorneys for Appellee:

A surrender by an insolvent and the acceptance of the cession by the court vests the title to the property surrendered in the creditors. 28 An. 337.

A cession accepted by the creditors transfers the property to them as completely as any other mode of alienation. 2 La. 354.

Minors being creditors of an insolvent must be represented at the meeting of creditors of said insolvent, and the natural tutrix is the only person who can represent the minors, unless she be divested by an order of court and some other person be specially authorized by the court to act for said minors instead of said natural tutrix.

The opinion of the court was delivered by

MILLER, J. This is an appeal by creditors of the insolvent and by the party claiming to have been elected syndic, from the judgment of the lower court, maintaining the appointment of syndic made by the court, on the ground there had been no election.

At the meeting of the creditors John R. Picton, one of the appellants, and Joseph D. Major, were candidates for syndic. Among the votes cast and counted by the notary for Major was that of the insolvent, voting on an asserted debt claimed to be owing by herself as tutrix of her minor children to herself as tutrix. The vote counted produced the result stated by the notary; a majority in amount voting for Major and a majority in number for Picton. The meeting of creditors was closed on the 9th of December, the *proces verbal* of their deliberations filed in court on the 10th, and on that day the court appointed a syndic on the basis of no election stated by the notary. Within the ten days from the filing in court of this *proces verbal*, Picton opposed the appointment of syndic by the court and certain votes counted for Major, and insisted that these votes excluded, he, Picton, had been elected syndic. This opposition was dismissed, the appointment of the syndic by the court maintained, and from that judgment the appeal is by Picton and the creditors who voted for him.

The discussion in this court presents but two propositions for decision: Had the lower court the right to appoint the syndic before the expiration of the ten days allowed for opposition. 2. Should not the vote of the tutrix for herself have been excluded and Picton decreed elected. The argument in this court concedes that if the vote of the tutrix is excluded, that Picton was elected. We take the case on the basis of that concession.

Within the ten days allowed for oppositions to the proceedings before the notary, no appointment of syndic should be made by the court, for such appointment could not stand if the votes on which it depended were subsequently set aside on the creditors' opposition. Revised Statutes, Sec. 1802. If rightfully made—*i. e.*, on votes entitled to be cast, it would not be set aside on appeal. This appeal, however, brings before the court the question of the legality of the vote cast by the tutrix. The decision of that question controls the case.

It is exacted by the law that the debt of the creditor on which he votes for syndic or matters and questions submitted to the creditors' meeting, must be liquidated. The amount of the debt represented by the votes cast, is one of the elements that determines the election of the syndic. To the end of ascertaining that amount of debt each creditor is required to "certify on oath." The obligation that may become a debt—*i. e.*, dependent on future conditions, is not a debt on which the creditor can vote. Consistently with the theory of the law requiring certainty as to the debt, it is settled that the wife in community shall not be allowed to vote unless her rights have been fixed by a partition or judgment for a separation of goods. So the vote based on notes of the insolvent given to his children to represent their interest in an unsettled community between their deceased mother and their father, the insolvent, were rejected because the supposed debts were not deemed liquidated. Revised Statutes, Secs. 1796, 1799; Terry & Sons vs. Creditors, 38 An. 17; Lesseps vs. Creditors, 7 An. 624. In view of our law and jurisprudence on this subject, it can not be maintained, in our opinion, that pending the tutorship, especially when there has been no liquidation of the accounts of the tutor, that there is any fixed debt by the tutor to the minors. The special mortgage in this case given in April, 1892, or, indeed, at any time, would not liquidate the debt of the tutrix. The mortgage is to secure the

ultimate rights of the minor as they may exist at the end of the tutorship. How then can it be held to fix debt of the tutrix at the incipiency or any stage of the tutorship? Until the tutorship ends, no suit can be brought to enforce the minor's right. The law considers that until that end of the tutorship, there is no debt due by the tutor. The only debt of the tutor incident to the relations he holds to his ward, is that which may exist when he ceases to be tutor. We, therefore, hold there was no debt in any legal acceptation on which the tutrix could predicate the vote cast by her for syndic. Gibbs vs. Lum & Co., 29 An. 531; Linn vs. Dee, 31 An. 217; Stewart vs. Bragg, 12 An. 361; Lesseps vs. Creditors, 7 An. 624; Succession Edwards & Wilson, 32 An. 459.

The view already expressed that the tutrix has no debt on which she can vote is enough to dispose of this case. There is, however, another aspect of the case. If the tutrix can appear in these insolvent proceedings it must be on the theory that she is to be deemed a creditor in her capacity of tutrix, of herself as the insolvent. She certainly is not competent to sue herself. If any proceeding in this matter could be deemed requisite to protect the interest of the minors, surely the tutrix could not act for them. Stewart vs. Bragg, 12 An. 361; Gibbs vs. Lum & Co., 29 An. 531. Again, creditors who appear in insolvent proceedings are subjected to the control vested by the law in the syndic. He is to sell the property, raise mortgages and pay the debts of the creditors, with the proceeds realized. The tutrix has no power to enforce the debt supposed to be due by her as tutrix, nor can she by any act displace the minors' mortgage, under our law to endure till the end of her tutorship. The nature of her relation to the minors precludes her, in our opinion, from appearing at the meeting of creditors. The minors are supposed to be fully protected by the special mortgage given by her. See Life Insurance Association vs. Hall, 33 An. 49. She can at the meeting of her creditors, convened under the insolvent laws, on her application perform no function or exercise no right with respect to the debt she may ultimately owe her wards, least of all, disturb the mortgage to secure their rights vesting in her property. In our view her vote as tutrix at that meeting was illegal.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be reversed; that the appointment of John Yoist as syndic of the creditors of Emma S. Major be avoided and annulled,

and that John R. Picton be and he is hereby decreed to be duly elected syndic of said creditors, with the right of exercising the duties of said office on giving bond as required by law, and that appellees pay costs.

No. 11,465.

NELSON TAYLOR VS. JOHN J. ELLINGTON.
JOHN J. ELLINGTON VS. NELSON TAYLOR.
(CONSOLIDATED.)

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With all due allowance for mitigating circumstances, damages will be awarded for injury to character by slander, aggravated by repetition. Civil Code, Arts. 1928 (Par. 3), 2315; Miller vs. Holstein, 16 La. 389; Savoie vs. Scanlan, 43 An. 967; Feray vs. Foote, 12 An. 894.

To charge an innocent man with burning another's property is actionable The law implies malice, and without proof of special injury damages will be given the injured party. Miller vs. Holstein, 16 La. 389; Feray vs. Foote, 12 An. 894; Savoie vs. Scanlan, 43 An. 967.

APPEAL from the Tenth District Court, Parish of Rapides.
Coco, J.

Hunter & Hunter and *R. J. Bowman* Attorneys for Taylor, Plaintiff and Appellee:

No principle is better established than that he who is to blame and has caused the slanderous words is not entitled to the favorable consideration of the court.

Ariail & White Attorneys for Ellington, Defendant and Appellant:

1. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. Revised Civil Code, Art. 2315.
2. There is no such thing in law as a *half-way* justification. Williams vs. McManus, 38 An. 161.
3. The charge that plaintiff, "the damn son of a bitch set fire to my stable, or burned my stable, to keep from paying rent," being an imputation of the commission of a crime, is, even under the common law, actionable *per se*. Cooley on Torts, pp. 195, 196.
4. But if the charge is not actionable *per se*, but is false, injurious, and made maliciously or *malo animo*, it combines all the elements necessary to support the action for slander. Spotorno vs. Fourichon, 40 An.; Miller vs. Holstein, 16 La. 389; Feray vs. Foote, 12 An. 894; Williams vs. McManus, 38 An. 161.
5. In actions of this character it is not necessary to prove malice; it may be implied. Canchoix vs. Dupuy, 3 La. 133; Tresca vs. Maddox, 11 An. 206.
6. Malice does not mean a spite against the individual, but *malus animus;* a wanton disposition, grossly negligent of the rights of others. *Idem.*

7. Every person has a right to enjoy that degree of respect, good will and social or business distinction to which his own acts and his social and business habits entitle him, and any one who unlawfully interferes with this right by circulating slanderous reports renders himself liable for consequent damages Williams vs. McManus, 38 An. 163, 164.
8. Injuries done to one's feelings by slanderous words used toward him by another in public, such as "thief and rascal," furnish legitimate ground for an action in damages, and the amount of damages will be measured by the aggravated character of the language used. Dufort vs. Abadie, 28 An. 280; 17 An. 64; 19 An. 322.
9. Injuries to the feelings, and to one's social standing, are not susceptible of a precise admeasurement. Still, in cases of this kind or class, such injuries are recognized as legitimate ground of action. Dufort vs. Abadie, 23 An. 280; 19 An. 322; 17 An. 64; 38 An. 164.
10. Where a person publishes a slander or rumor, he can not escape liability by proving that a report was in circulation, or that a third person told him such report, before the time of speaking the words charged. American and English Encyclopedia of Law, Vol. 13, pp. 402, 403; Cade vs. Reddit, 15 An. 492; State vs. Benjamin, 15 An. 166.
11. When one, in an ebullition of passion, makes slanderous charges, and again repeats them when calm and cool, his being in a violent passion at the particular time alleged is no reason for abating the damages. Sedgwick on Damages, Vol. 2, pp. 507, 508.
12. If a plea in mitigation is advanced without foundation, and not interposed in good faith, it is a high aggravation of the slander, an evidence of actual malice, and should materially enhance the damages. Sedgwick on Damages, Vol. 2, p. 508, n.
13. In an action for slander, evidence of the repetition of the slanderous words after the commencement of the suit is admissible to show malice. American and English Encyclopedia of Law, Vol. 13, p. 428.
14. In an action of slander, it is sufficient to prove the substance of the words charged. Freeland vs. Lanfear, 2 N. S. 257.

The opinion of the court was delivered by

MILLER, J. The plaintiff, Nelson Taylor, sues defendant, John J. Ellington, for damages for the loss of the stable and dwelling of Taylor, alleged to have been burned by the gross carelessness or imprudence of Ellington. The plaintiff in the second entitled suit, John J. Ellington, sues Taylor for damages alleged to have been caused by his slander, imputing to Ellington the burning of the property. The cases were consolidated, tried together, and the verdict was against each plaintiff, with divided costs. Ellington appeals and Taylor answers, claiming an amendment of the judgment, so as to give him the damages he claimed.

The briefs place the cases before this court on their merits, without reference to some questions that arose during the trial.

The suit of Taylor will be first considered. Does the record show his property was burned by the imprudence of Ellington? The dwelling and stable occupied a square of ground; the dwelling being separated from the stable. The wing of the stable fronted the street, and from the end of the wing the stable extended back to Fourth street. Toward the rear was the mule pen, and over this pen, more than ten feet from the ground, was the hay loft. In this loft the fire originated on the morning of the 8th September, 1892, and was discovered soon after Ellington came to the stable. The basis mainly, on which he is charged with responsibility for the fire seems to be his statement that in the early morning of the fire, while it was yet dark, he went to the rear of the stable to look for a horse, taking a lamp in his hand. This purpose, it is manifest, would not have carried him into the hay loft, or brought the lamp in proximity to the hay. The incident is discarded as affording any basis to hold Ellington.

It is claimed that other statements by him on the occasion of the fire place the responsibility for it upon him. The witnesses do not profess to give his words, but their impressions of his statements. One witness testifies: "Ellington said he lit the torch, went back, stayed a little while, and on returning to the front of the stable noticed the hay on fire." This would be a frail basis to conclude that the lamp in his hand, on the ground floor, ignited the hay in the loft ten feet above him. Another witness gives his recollection of the "idea" conveyed by Ellington: that he carried the lamp back to where the horse was; after walking in the barn with the open lamp or torch, looked back and saw the hay on fire, and that Ellington said he was not certain that the fire caught from the lamp, but did not see any other chance for it. The witness gives his idea of the significance of Ellington's language, and is quite positive of the accuracy of his impression. Still, it must be accepted, the deductions of a witness drawn from statements of another made months previous may be erroneous. When these deductions are in conflict with other testimony, their force is further diminished. Another witness puts it thus: Ellington, referring to a torch used in the stable described as a lamp on a pole, stated he reckoned the fire caught from the torch. This witness, alluding at the beginning to the lapse of time since the fire, stated his memory was very indistinct. On cross-examination he testified: Did not remember that Ellington used the word

"pole," but the witness "pictured" the lamp on a pole, such as used by brass bands. He further testified: Ellington said he did not know how the fire happened unless from the torch; but did not say the fire happened from the lamp "going into it." The comment suggested by all this testimony is, that Ellington himself had no convictions of the cause of the fire. To accept the statement attributed to him, as admitting he fired the stable would be to invest what he said with a meaning never intended and not warranted by the fair significance of language. The fire attracted a crowd naturally interested and curious as to the cause. The fire was in progress. In the excitement and confusion incident to the occasion, questions were put to Ellington and answered by him as to the origin of the fire. He himself was agitated. Under such circumstances his answers may have been misconceived. His answers indicate an inability to account for the fire, and aside from the lamp incident, avowed by him, he had no more knowledge on the subject than those whose questions he endeavored to answer. His answers practically, added nothing to the fact that he had gone to the rear of the stable with the lamp. If that fact connected him with the fire overhead in the loft, his answers neither detracted from or diminished the force of the circumstance. Another feature in the testimony as to his statement is impressive, and must be deemed to impair the effect of the testimony. The witnesses speaks of a "torch." The word conveys the significance of a flaming light elevated on a pole. It is this flaming light "pictured" by one of the witnesses that doubtless, colored his impressions of Ellington's statements. It was the idea of a man walking about a barn with a "torch" that impressed another witness. The supposed torch, it seems, was an open tin lamp carried in the hand, and in use in the stable by Taylor, and continued to be used by Ellington when he became the lessee. It is urged, too, that there is a discrepancy in Ellington's testimony and in his statements. The supposed variance is this: That one statement is, when he first saw the fire it was on top of the hay and spreading; another is, that going to the rear and returning he looked back and saw the fire; and another statement is, that going back to the mule pen he discovered the reflection of the fire on the back of the stable. If there is a discrepancy, in our opinion it is of no weight. There is before us also the testimony of Ellington. He is accorded the highest character by the testi-

mony. He testifies distinctly, that when he discovered the fire he was forty feet away with the lamp, and the lamp had no connection whatever with the fire.

The origin of the fire is not solved by the testimony. Whether caused by tramps entering through the openings claimed to exist in the stable, or by the heating of the hay, suggested by the testimony, is pure speculation. It would be hard to make a man responsible for a fire because he can not account for it, and harsher we think, to place the responsibility for the fire on Ellington in view of the testimony in the record.

On the issue of damages claimed by Ellington of Taylor the proof is, that the slanderous words charged in the petition, that Ellington had burned the property, accompanied with opprobrious epithets, were uttered publicly by Taylor and repeated. There was thus imputed to Ellington not only the burning, but the intentional burning of the property. For slander of reputation the law gives damages on the theory of injury sustained, as well as from public policy. The enforcement of the law in this respect is salutary. It substitutes the judicial vindication of character for the redress apt to be sought by violence, and affords some pecuniary compensation for the humiliation and injury wrought by slander. The case presents some features of mitigation for which we are disposed to make allowance. With all due consideration for the impression or belief of Taylor of wrong at the hands of Ellington, the law exacts that damages should be imposed for slander grave in character and aggravated by repetition. Civil Code, Arts. 2315, 1934, Par. 3; Miller vs. Holstein, 16th La., 389; Savoie vs. Scanlan, 43 An. 967.

It is therefore ordered, adjudged and decreed that the judgment of the lower court dismissing the suit of Nelson Taylor vs. John J. Ellington be affirmed with costs; that the judgment of the lower court dismissing the suit of John J. Ellington vs. Nelson Taylor be avoided and reversed, and it is now ordered, adjudged and decreed that John J. Ellington do have and recover from Nelson Taylor three hundred dollars damages with costs in both courts.

No. 10,930.

SEARCY & CO. VS. THEIR CREDITORS.

Judgments homologating as far as not opposed the accounts of an administrator or syndic, fix the rank of creditors and order of distribution stated in the account and such judgments can not be disturbed by subsequent judgments except so far as concerns opponent, if his opposition is sustained. 14 La. 242; 7 N. S. 182; 1 Hen. Digest, 759, No. 29, *et seq.*

The lessor's claim for rent and certain privileged debts rank the debt of the vendor of movables, and when the funds brought on the account it is manifest, leave nothing for such vendor after satisfying the privileged debts preferred to him—the judgment directing him to be put on the account will be reversed.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Wm. Armstrong Attorney for Synidic and *Zacharie & Armstrong* Appellants:

The landlord's lien extends only to the contents of leased premises, and as to such contents, primes the vendor's privilege.

Both are outranked by law charges, as to the particular effects upon which they apply.

Law charges include all costs and expenses that are necessary for the distribution of the effects of an insolvent estate, and enure to the benefit of creditors in general. Among these are notary's fees, fees of attorneys in advising the insolvent and preparing schedules, etc., for surrender, fees of attorneys to the provisional syndic and syndic.

Notaries, attorneys to insolvents in preparing schedules for surrender, attorneys to provisional syndic and syndic, have a first lien and privilege on the effects of an insolvent estate concurrent with other court costs and expenses of administration.

Debts of a succession or those of the estate of a ceding debtor are of a higher dignity and are to be paid before those of the deceased or insolvent. 10 L. 438.

Where the record demonstrates as a fact that a vendor's privilege upon a movable is absorbed by admitted superior privileges thereon, such as the cost of preservation, court costs and landlord's lien, the vendor is without legal interest to question the relative rank of the landlord's privilege and another admitted legal privilege upon other effects of an insolvent estate not subject to the vendor's pivilege.

Litigants are not allowed to champion vicariously the rights of others where no benefit results therefrom to themselves.

Judgments approving and homologating a final account of a syndic (except as opposed), are final and conclusive and constitute *res adjudicata* as to all creditors who have not filed any oppositions to the account within the delays prescribed by law, or who have subsequently acquiesced therein.

Guy M. Hornor Attorney for Opponent and Appellee:

The vendor is entitled to be paid out of the proceeds of the thing sold before other privilege creditors, with the exception of the charges of affixing seal, for mak-

ing inventories, and others necessary to procure the sale of the thing. Monrose vs. His Creditors, 2 Rob. 280; Lauve vs. His Creditors, 2 Rob. 527; C. C. 3267.

The commissions of syndic upon the property sold take precedence of the vendor's privilege as an expense of administration resulting to the benefit of the vendor, but not so the fees of the counsel for insolvent, nor the counsel for syndic, nor the attorney of absent creditors. Marsh vs. His Creditors, 11 An. 469.

The vendor of an immovable, in the settlement of the succession of the vendee, is entitled to be paid in preference to every other claim except those charges which have been necessary to procure the sale of the thing. Of these charges attorney's fees form no part. Succession of Markey, 22 An. 265.

The homologation of a tableau wherein not opposed is absolute, and no creditor who has not made opposition can do so, even on the ground of oppositions filed by others before the homologation. Ventriss vs. His Creditors, 20 An. 359

The opinion of the court was delivered by

MILLER, J. This is an appeal by the syndic and his attorneys from the judgment of the lower court maintaining an opposition of a creditor to the syndic's account. The funds in his hands were mainly derived from the sale of the effects in premises leased by the insolvents, and the rent for the unexpired term of the lease is unpaid. Among these effects were certain movables, bought by the insolvent, sold separately at the instance of the unpaid vendor, realizing more than enough to pay him, and on the proceeds he asserts the vendor's privilege. Besides the funds arising from the sale of all these effects in the leased premises subject to the special privileges of the lessor and vendor, there are funds for distribution derived from other sources.

There were two accounts filed. The first exhibited privileged debts incident to the syndic's administration and others; the aggregate of all these privileged debts were deducted from the mass of the funds and the residue awarded to the lessors. It is obvious the account was not framed in accordance with the provisions of the law directing the distribution of funds when there are general and special privileged debts to be paid from funds, a portion of which are subject to no special privilege, and another, in this case the larger portion, is charged with the privileges of the lessor and vendor. Civil Code, Arts. 3191, 3252, 3254, 3256, 3263. The account was homologated as far as not opposed, the only opposition coming from the unpaid vendor of the movables sold separately. The opposition asserting the right of payment over all, save the charges of sale, from

the proceeds of the movables, was sustained and the syndic directed to recast his account. The syndic then filed another account, in which he pursued the same method of distribution of paying the mass of all privileged debts from the mass of all the funds. This account was homologated as far as not opposed; like the first met with no opposition except from the unpaid vendor asserting his privilege for the unpaid price, on the proceeds of the movables he had sold, paramount over all save charges of sale. On the last account the total funds were stated $3390. The privileged debts, attorneys and notaries' fees, auctioneer's commissions, syndic's commissions, clerk hire and others figured on the account amounting to $1813.11. All deducted from the mass of all the funds left $1576.97, and this residue was awarded to the lessor, his unpaid rent amounting to $2700.00, for which he was put on the account. The lessor was left unpaid for a large portion of his rent, and there was nothing for the unpaid vendor. On the opposition the court decreed that privileged debts —*i. e.*, charges for attorneys and notaries' fees, were inferior to the privilege of the unpaid vendor, and that he should be placed on the account with preferences over these fees amounting to $590; the court further decreed that the lessor as well as the vendor had preference over these fees, and reduced $100 on the account as reserved for costs to $20. From this judgment on the opposition this appeal is taken by the syndic and his attorneys, whose fees are subordinated by the judgment to the special privileges. The contention of the attorneys is, that by the judgments homologating the accounts as far as not opposed, their fees were to be paid by preference over the lessor; that these judgments constituted *res judicata* against the lessor, who made no opposition. The contention of the syndic is, that he can pay only to the extent of the funds in his hands, and that the uncontested privileged debts and the lessor's unpaid rent more than absorb all the funds, hence the judgment is erroneous in ordering the opponent to be put on the account.

The judgments homologating these accounts as far as not opposed determined as against all, save the opponent, that all these privileged debts were to be paid before the lessor. Whatever may be said of the method of distribution adopted by the syndic these judgments must have effect. Burrell vs. Read, 14 La. 242; Mayfield vs. Comeaux, 7 N. S. 182; 1 Hennen's Digest, p. 759, Nos. 2, 9, *et seq.* The lessor whose privilege is superior to that of the opponent

(Civil Code, Art. 3262) is certainly bound by these judgments, according preference to all privileged debts. This preference fixed by the judgments homologating the account, could not be disturbed by the judgment of the lower court subsequently rendered on the opposition only of the unpaid vendor. On that opposition the privileged debts to the extent of $590, are excluded from competition with opponent. But with that exclusion there remains on the account privileged debts ranking as first in order of payment amounting to $1223. These debts as to amount, save the reserve of $100, were not called in question by the opposition. The judgment unappealed from by the opponent leaves them in full force. The lessor's claim figures on the account at $2740, not opposed and maintained by the judgment. Thus, there stands between opponent and the relief he seeks over $3900 of superior privileges recognized by final judgment. The privileged debts to the extent of $1223 are beyond the domain of contention by the absence of opposition, and the judgment acquiesced in, and the priority of the lessor over the opponent is fixed, not only by the judgment but by the law (C. C., Art. 3258). The judgment of the lower court responding to the demand of the opponent asserts the preference given to him, when there are funds that can be so applied, consistently with debts of the higher rank. The difficulty in opponent's case is that in the plenitude of his privilege, still there is no room for him on the account.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided, annulled and reversed at the costs of the appellees.

No. 11,485.

A. ADLER & CO. VS. BURTON LUMBER COMPANY.

The vendor preserves his privilege though he takes notes for part of the price, and no presumption that he novates the debt and extinguishes the privilege arises from the fact that in acknowledging delivery of the notes he gives a receipt worded: "I acknowledge receipt of the price, payment being satisfactory and in notes," especially when by the contract notes were to be given for part of the price, and besides when it appears by the testimony no novation was intended. To hold that the privilege of the vendor was extinguished under such circumstances would be subversive of the principle that novation is never presumed, but is accomplished only by discharge of the debt or express agreement of the parties (Civil Code, Arts. 2185, 2190, 3227; 16 La. 469; 34 An. 585); cases collected in 2d Hennen's Digest, 993, No. 1; 4 An. 318; 8, An. 600.

To sell the property of a defendant before any judgment against him is to exercise power which, if the courts can exercise it, should be exerted only in exceptional cases, and this is not such a case.

APPEAL from the Fifteenth District Court, Parish of East Baton Rouge. *Buckner, J.*

Kernan & Laycock Attorneys for Plaintiffs and Appellants:

An affidavit clearly setting forth the character of a debt, to which the law grants a privilege, is an affidavit to the privilege, and is in this respect sufficient to warrant an order for sequestration. C. P. 276.

The court may order the sheriff to sell sequestered property *pendente lite*, if it be perishable. C. P. 283; Calder vs. Creditors, 44 An. 455; 15 La. 481; 12 An. 552; 11 La. 444; 41 An. 742.

The vendor's privilege need not be expressly stipulated; its renunciation must not be doubtful, but the language must clearly imply that the creditor intended to give up this right. Baker vs. Frellsen, 32 An. 827; Bacchus vs. Moreau, 4 An. 313.

The change of the form of a contract or a modification of the manner of the execution thereof does not effect novation, which is never presumed and must be expressly stipulated or result clearly from the language used. Aillet vs. Woods, 24 An. 193; 34 An. 927, 534, 1113; 11 R. 9; 4 An. 281; 5 An. 436; 6 An. 669; 5 An. 508, and Pothier on Obligations, Sec. 559; R. C. C. 2182, *et seq.*

The receipts of the vendor, without reserve of privilege, for notes in payment of the debt does not novate the debt or extinguish the privilege. Marcadé Code Napoleon, Vol. 4, p. 458, No. 763; Troplong des Priviléges et Hypothèques, Vol. 1, p. 304; Aubry & Rau, Droit Civil Français, Vol. 4, p. 218. Sec. 324; Demolombe des Contrats, Vol. 5, p. 209, No. 297; Aillet vs. Woods, 24 An. 193.

C. C. Bird and *Alvin E. Read* Attorneys for Defendant and Appellee:

Sequestrations * * * by which the property of a party is wrested from his possession, and taken into the custody of the law before judgment, without notice, and upon the *ex parte* showing of the plaintiff, are extraordinary, and hence the doctrine has been uniform, that they are to be strictly construed, and that the requisites of the law must be observed on pain of nullity. 2 An. 415; 1 An. 308; 2 An. 920; 11 Rob. 158; 3 La. 18; 4 An, 456.

Affidavit as to material fact only on belief is insufficient to obtain powers. Bergh vs. Jayne, 7 N. S. 609; McFarland vs. Richardson, 1 An. 13.

When note is received in payment, privilege is lost. 2 N. S. 144; 6 N. S. 657; 2 La. 111; 16 La. 140; 2 An. 175; 4 An. 543; 14 An. 54.

There is no law which authorizes the sale of sequestrated property, as there is in cases of attachment.

The opinion of the court was delivered by

MILLER, J. The plaintiffs, holders of promissory notes given by the defendant for the credit portion of the price of certain logs pur-

chased by him, bring this suit to compel payment of the notes. The original and supplemental petitions set forth the purchase of the logs by defendant, the execution and delivery of the notes in part settlement of the price, the acquisition of the notes by plaintiff, and there is the averment that plaintiffs are informed and believe that the notes are secured by the vendor's privilege. On these petitions, supported by affidavit, a writ of sequestration issued and the logs were seized by the sheriff. The plaintiffs soon after applied for an order to sell the property *pendente lite* on the ground that lying in the Mississippi river, it was expensive to keep and liable to be lost.

The defendant moved to dissolve the writ on the grounds that the affidavit was insufficient and that plaintiffs had no privilege.

The lower court dissolved the writ on both grounds and dismissed plaintiffs' application to sell the property. From this judgment plaintiffs appeal.

The motion to dismiss for supposed insufficiency of the affidavit is based on the averment in the petition that plaintiffs are informed and believe that the notes are secured by the vendor's privilege. This privilege arises from the nature of the debt. The petition set forth that debt—*i. e.*, that the notes were given to the vendor by the defendant for the price of the logs, and that the notes are unpaid. These allegations are supported by the requisite affidavit. The averment in the petition that plaintiffs are informed and believe that the notes are secured by the vendor's privilege, announce merely the legal conclusion necessarily arising from the facts stated in the petition and sworn to by the attorney for plaintiff. We can not perceive any defect in the affidavit.

It was stipulated in the contract for the purchase of the logs that the notes were to be given for part of the price. The vendor from whom or through whom plaintiffs acquired the notes, gave to defendant a receipt reciting the receipt of the price of the logs, stating settlement in full, with this addition: "the payment being all satisfactory and in notes." The contention of defendant is that under the receipt expressing "payment in notes" there is no privilege on the logs, or in other words that the privilege of the vendor is destroyed because of the form of this receipt.

The vendor's privilege arising by operation of law from the contract itself, is not readily presumed to be relinquished. The privilege exists without stipulation, and its relinquishment is to be deduced

not from inference, but only from the consent of the vendor expressed or plainly implied. Bacchus vs. Moreau, 4 An. 313; Boner vs. Mahle, 3 An. 600. It is not easy to infer any release of the privilege from the frame of this receipt. After all, the supposed relinquishment involves the question of intention. It would be forcing the significance of words to hold that the vendor intended to surrender his privilege by the words "payment in notes." The words themselves imply not a payment absolutely, but the giving of notes to represent the price.

Of course, novation of the debt extinguishes the privilege. But is there any novation by the creditor taking notes from the debtor for the debt? This would seem to be answered in the negative by the text of the Code—that the privilege subsists though the creditor take a note, and by the articles of the Code defining novation. Civil Code, Arts. 3227, 2185, *et seq.*

Novation not arising from the fact that the vendor takes notes for price, nor arising from any inference consistent with the significance of the language of the receipt, the remaining contention of defendant is that the receipt expresses payment of the debt. Does it? The receipt is qualified. It is "receipt for the price, payment in notes." The qualification is material. Its import is that the debt is not paid, but still subsists in the form of notes. The receipt imports a mere change of form, but the debt itself with the privilege attached to it remains. In reaching this conclusion we are aware there are some *dicta* seemingly to the contrary as to the import of "received payment by notes." We can not give to the words used here the meaning of an absolute payment, a meaning we think, repelled by the language and the manifest intention of the party. We are aided, too, in this case by the proof in the record that there was no intention to novate. The authorities later in date in our own reports sustain, we think, our conclusion, and as to the French authorities arrayed in the brief of plaintiff, they are practically unanimous that there is no relinquishment of the privilege in a case like this. See Bourgeat vs. Smith's Syndic, 16 La. 469; Bergeron vs. Patin, 34 An. 535.

But the application to sell the property *pendente lite*, we do not think should prevail. To sell a defendant's property before any judgment against him for the debt, occurs to us as involving the exercise of power which, if it exists, at least, is to be exerted only in exceptional cases. Without passing on the question of power at all, it suffices to say, we decline its exercise in this case.

The views we have expressed control the decision, and obviate more detailed reference to other points in plaintiff's briefs, to which we have given careful attention.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed in so far as it refuses the application to sell, and reversed in so far as it maintains the motion to dissolve plaintiff's writ of sequestration, and appellees pay costs.

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No. 11,484.

MARY E. CLARK AND HUSBAND ET ALS. VS. JOHN COMFORD ET AL.

ON MOTION TO DISMISS THE APPEAL.

The deputy clerk certifies that the transcript of appeal, together with the record of a previous appeal, is a correct transcript of all the proceedings.

The appellants were parties to the suit in the previous case and failed in their attempt to sustain their appeal.

Held: that records of the clerk's office of this court may be used here, on appeal, to complete the record of a transcript, when it is manifestly a correct transcript of the proceedings in the court of original jurisdiction, and that another transcript would only be a second copy of the proceedings.

ON THE MERITS.

The reasons assigned in a case previously decided and the decree are adopted and followed.

The plaintiff and appellant whose rights were considered and passed upon in the prior appeal, in which he alone was appellant, was the co-plaintiff, in the District Court, of the appellants, in the case at bar.

Two separate appeals were taken at different times from one judgment.

The reasons and decree in deciding the issues on the first appeal are determinative and followed in the second appeal.

APPEAL from the Sixteenth District Court, Parish of Livingston. *Reid, J.*

J. L. Bradford and *Calhoun Fluker* Attorneys for Plaintiff and Appellant.

Cross & Cross filed motion to dismiss, but did not argue the case or submit briefs.

The opinion of the court was delivered by

BREAUX, J. This case was before us for decision at the last term. 45 An. 502.

This court decided that only one plaintiff, to-wit, Nathaniel Ewing, was a party to the appeal.

The bond of appeal was executed by him alone.

The other appellants not having executed any appeal bond whatever the court decided that they could not be heard in that capacity.

As to those plaintiffs and appellants who had not furnished bond, the judgment of the court *a qua* at that time remained, rejecting their demand to be recognized as owners of the property described in their petition.

Also rejecting their prayer to annul and set aside an agreement of sale, and to annul and set aside the sale of any portion of the land by John Comford to Thomas Cockerham, and denying the rent claimed and their right to possession.

The judgment thus rejecting the demands of plaintiffs was signed by the judge of the District Court on th 12th day of December, 1892.

There was judgment rendered "as against the appellant of non-suit, leaving all questions open between appellant and defendant which are involved in this litigation."

The decree reads: "For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment of the District Court, in so far as it affects the appellant, Nathaniel Ewing, be and the same is hereby annulled, arrested and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the defendants against the plaintiff, Nathaniel Ewing, dismissing his demand as in case of non-suit."

In this state of the case there was an absolute judgment in the District Court in favor of the defendants and against all the plaintiffs, except Nathaniel Ewing, appellant, against whom there is a judgment of non-suit, pronounced by this court.

On the 31st day of August, 1893, Mary E. Clark, wife of Robert D. Clark, and all her co-plaintiffs in the suit except Nathaniel Ewing, who had been non-suited on appeal, obtained an order of appeal returnable to this court on the second Monday of February, 1894. The appeal was perfected by furnishing the required bond.

MOTION TO DISMISS THE APPEAL.

The appellees represent that the appellants have completed their record in this case by annexing the record in Clark *et al.* vs. Comford, No. 11,220 of the docket of this court.

That the clerk who certified the original record died before the certificate to the record in the case at bar was made, and that the deputy clerk who certified to the correctness of the transcript could not possibly have knowledge of the facts so certified to by him.

The deputy clerk, whose authority is questioned, certifies that the transcript in the case at bar, together with the record already filed in this court in the case heretofore dismissed by us (viz.: the case of Clark *et al.* vs. Comford *et al.*, No. 11,220), is a correct transcript of all the proceedings in the case of Mary E. Clark *et al.* vs. John Comford *et al.*, No. 201 of the District Court, the case now before us on appeal.

The plaintiffs, prior to the last appeal, and the appellant Ewing, had deposited a transcript which formed part of the records of this court.

It contained copies of all proceedings, except those subsequently copied, on four pages which constitute the record of the last appeal, to enable them to bring up their appeal.

There is not a fact needful to a decision of the case that is not before us on appeal.

The appellees do not complain that the transcript is incomplete; they only urge that the officer could not certify to the correctness of the first transcript filed (*i. e.*, of the transcript of record in the decided case).

That transcript has the certificate of the clerk in office at the date of the appeal. It needs no further certification.

Generally, these records of appeal must remain in the custody of the clerk of this court and no permission will be given to use them as evidence and to actually introduce them in evidence in the trial of cases in other courts.

There can be no well founded objection, however, to the use here on appeal of a former record in this court in order to avoid copying twice the proceedings of a case.

This practice has received sanction when preceded by agreement of counsel.

The court also has granted permission to use records here, within its direct control, to complete a transcript when it was evident that they contained correct copies of the proceedings needful on appeal.

Vredenburg vs. Behan, 32 An. 261; Harrison & Bro. vs. Their Creditors, 43 An. 91.

It is manifest that there is of record complete transcripts of all the proceedings and that each transcript has to it a legal certificate.

Had an agreement been entered into between counsel prior to the last appeal, to have the record annexed as forming part of the records, it would have served all purposes without question.

Had an order of this court been applied for (the more regular practice), under the circumstances it would have been granted.

The failure to apply for the order will not carry with it the dismissal of the appeal, it being evident that the case is properly before us for decision.

The motion to dismiss the appeal is therefore overruled.

ON THE MERITS.

Counsel for the appellants in support of their appeal refer us to the statement of facts upon which the case, in so far as relates to Nathaniel Ewing, was submitted to this court and to their brief in that case.

The issues received careful consideration at the time.

No good reason is urged to justify a change from our previous decree or to recall any of the grounds upon which it was based.

The conclusion reached must be the same in the case at bar, and the reasons assigned must be held to apply.

All the plaintiffs have the same rights and are subject to the same responsibility.

It follows that the same is true of the defendants *inter se*.

It is ordered, adjudged and decreed that the judgment of the District Court appealed from in this case, in so far as it affects the appellants, Mary E. Clark, assisted by her husband, Robert D. Clark, Mary V. Ewing, John K. Ewing, Jr., Samuel E. Ewing, Belle E. Howell, Eliza W. Wilson, assisted by her husband, R. H. Lindsay, Catherine W. Wilson, assisted by her husband, H. W. Hazard, and Mary Wilson, assisted by her husband, J. W. Harrison, be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the defendants against the plaintiffs, Mary E. Clark and others, above named, dismissing their demands as in case of non-suit.

No. 11,464.

MICHAEL VANOSDEL, CURATOR, VS. JOHN A. HYCE.

It is not established that the person interdicted in 1893, whose curator sues to set aside a deed of sale, was *non compos mentis* in 1879, at the date of the sale; nor is it established that he was at the time, because of the weakness of his mind, unable to give his consent intelligently as a vendor of his property.

Generally, an executed contract, fairly made with one who was apparently of sound mind and not known to be otherwise, and of which he had received the benefit, can not be avoided by his legal representative more than fourteen years after the date of the contract.

APPEAL from the Fifteenth District Court, parish of East Baton Rouge. *Buckner, J.*

H. N. Sherbourne and *T. A. Moore* Attorneys for Plaintiff and Appellant:

Although no sentence of interdiction may have been pronounced, yet it will be sufficient to vitiate a contract if it can be shown that insanity or imbecility of mind has been taken advantage of. Holland vs. Miller, 12 An. 624; C. C. 1780-2, 1788.

Contracts made with weak-minded persons will be closely scrutinized, and a presumption of fraud will arise from circumstances indicative of over-influence or any advantage improperly taken, which would not arise in a strong-minded person. Wharton & Stille Med. Jurisprudence, p. 10, Sec. 4; 1 Story Eq. Jurisprudence, 228; Chevallier vs. Whatley, 12 An. 651; 32 An 91, 170; 35 An. 441.

Good faith is an essential to the acquisition of property by the prescription of ten years. Edwards vs. Bellard, 12 An. 362; Walling vs. Morefield, 33 An. 11, 74; Green vs. Moore, 44 An. 856; C. C. 3478.

The prescription of three years does not apply to the rents and revenues of property claimed in the petitory action against a purchaser in bad faith. Walling vs. Morefield, 33 An. 1174.

That a *fraudulent* act is in bad faith is self-evident.

A person knowing of defects of title is in bad faith and can not plead the prescription of ten years. 44 An. 856; Walling vs. Morefield, 33 An. 1174; C. C. 503, 3478-89, 3451.

A person in bad faith owes rents and revenues from the date of his occupancy. 33 An. 744, Sec. 4, Woods vs. Nicholls.

The prescription of three, five and ten years can not be made by a person in bad faith or *causa acquirendi*. 33 An. 1174; C. C. 3478, and C. C. caption Sec. 3, including Sec. 3, Art. 3542, show that the plea applies to *liberandi causa*.

The admissibility of evidence given of facts not alleged in the petition should be objected to when offered and the point reserved, otherwise it will be considered as if it had been responsive to an allegation in an amended petition filed with the consent of the opposite party. England vs. Grippon, 15 An. 304.

It is not necessary to file an amended petition in reply to, and explanatory of, an amended answer, as the testimony in support of its averments is admissible under the issue presented by the amended answer. Swilling vs. Law, 13 An

412. All matters of defence set up in the answer must be considered as open to any objection of law and fact, as if such objections had been specially pleaded. Hickman vs. Dawson, 33 An. 438.

Kernan & Laycock and *J. W. & G. W. Burgess* Attorneys for Defendant and Appellee:

To annul a contract, for the insanity of a party to it, who has not been previously interdicted, it must be shown not only that the incapacity existed at the time the contract was made, but also that the person contracting with him knew of the incapacity, or that his insanity was notorious. R. C. C. 402; 1788, Secs. 2 and 3; 5 M. 425; 10 M. 604; 12 M. 255; 4 L. 114; 12 An. 24; 38 An. 546.

Notoriety in this sense can only be shown by the testimony of those who generally saw and conversed with the person incapacitated.

Insanity, urged as the cause for invalidating a contract, must be clearly proved; doubts are resolved in favor of the sanity of the person contracting. 12 M. 255.

Where the consideration of a sale enured to the benefit of the interdict, it can not be annulled on the ground of the insanity of the vendor without restitution of the purchase price; and, in any case, the vendee must, on proper pleading and proof, have judgment for his improvements up to the sum by which they have enhanced the value of the property.

A suit brought to annul a sale more than fourteen years after its execution is a stale demand, which must be established by the clearest and most convincing proof.

The opinion of the court was delivered by

BREAUX, J. In 1893 suit was brought against Enoch Vanosdel and his interdiction decreed.

The plaintiff was appointed his curator.

This suit was brought by the curator to annul and set aside a deed of sale, dated the 22d day of January, 1879, signed by Enoch Vanosdel, as vendor of a tract of land containing 160 acres, to the defendant. The vendor reserved the right to purchase back the property, until the 1st of January, 1880, by returning to the purchaser the amount paid by him on the property, and returning the promissory note representing a portion of the purchase price. He remained in possession after the sale, which was intended as a security for advances to be made by the vendee. On the 21st day of November, 1879, Enoch Vanosdel acknowledged in a notarial deed, signed also by his wife, that he had received the full amount of the purchase price, and renounced the right of redemption stipulated in the deed of 22d January, 1879.

This land was acquired by Enoch Vanosdel from G. W. Martin in an exchange, dated 12th January, 1879.

Two of the deeds were passed before John McGrath, recorder of the parish of East Baton Rouge.

From the 1st of June until the latter part of October Enoch was afflicted with mental alienation, and was a patient during that time at the Insane Asylum at Jackson, undergoing medical treatment.

The purchaser, prior to the signing of the confirming deed of November, 1879, paid $100 to Enoch and $100 to his wife, making $2300, according to Hyce's account. The act of sale was for $1500.

The witnesses testify that it was about all that the place was worth.

With reference to his mental condition, G. A. Bozeman, a farmer residing near this vendor, Enoch, in 1879, and who subsequently was employed in the sheriff and assessor's office, and had opportunities to judge as to whether he was insane, testifies that he knew him intimately, and regarded him as a man of sound mind in the early part of 1879.

The sheriff of the parish and a number of other witnesses testify that they knew him, and never noticed that he was deranged prior to the date he was sent to the Insane Asylum; that after leaving the asylum in 1879 he appeared sane; that he voted intelligently, and sought to support himself and family, consisting of wife and children.

The notary before whom the acts were passed testifies that there was nothing in the conduct of the vendor, when he passed these acts of sale, to indicate that he was in the least deranged.

Dr. T. S. Jones testifies that he has known Enoch Vanosdel over forty years, that he was a stupid boy, but that he can not state that he was an imbecile.

Other witnesses testify that he was always weak-minded, and refer to certain of his acts as showing insanity.

The testimony, however, does not sustain the contention of the plaintiff that at the time of these transactions Enoch was incapable of transacting business or of making contracts for the want of sufficient intelligence and sense to manage his affairs, and that in his weak mental condition he fell an easy prey to the wiles and machinations of the defendant Hyce.

More than twenty witnesses, who knew him well, resided in the same parish; many of them his neighbors, who met him frequently, conversed with him and knew of his different business transactions, testify that they did not know of any of his acts indicating insanity,

and that they had never heard that he was insane at the time that the deeds were passed.

The transactions at the time were not referred to or spoken of in the community by any one, in so far as the evidence discloses, as the acts of imposition and fraud by an unscrupulous neighbor, the defendant merchant.

The brother who became the interdict's curator and the plaintiff in this suit, in that capacity, had a business transaction about the same time with the defendant. He also obtained advances from the defendant and deeded to him the same number of acres of land, worth about the same amount, to secure the advances.

It does not appear that the terms and conditions differed materially from those complained of in this suit.

Not long subsequent to that date the plaintiff himself had business dealings with his brother.

While unimportant in amount they do not have a tendency to establish that he was known as a person of insane mind.

One of the witnesses testified that she had told the defendant that Enoch was a "man of very little sense," that "he was idiotic," and that he had never transacted any business.

She is the only witness who testified as to any notice to the defendant. She is not corroborated by the weight of the testimony, particularly in so far as relates to business transactions, for it is well established that he did transact business.

The defendant denies that he was ever notified or received any warning not to deal with him.

More than fourteen years had elapsed; the transactions remained unquestioned all these years, without even adverse comments; we do not feel authorized to disturb these executed contracts.

In reference to the advances made by the defendant on the property placed in his name as security:

A receipt in notarial form was executed after they had been furnished.

The mules that were part of the property thus advanced are said by several witnesses not to have been worth the amount charged.

The record discloses that they were not sold directly by the defendant, as appears from the following:

"W. H. Wright, sworn, says:

Q. "Did you let Mr. Enoch Vanosdel have some mules during the

first part of the year '79? If so, please state how many, at what price and who paid you for them? A. I sold some mules to Mr. Vanosdel in the early part of '79. I sold him, I think, four mules; I ain't sure. Mr. Vanosdel, as I recollect, came here to Baton Rouge. He wanted to buy some mules and he looked at the stock; he told me he would buy them and he would make arrangements with Mr. Hyce to pay for them. I went up to Mr. Hyce's place and he, Mr. Vanosdel, was at Rolling Fork, and he, Mr. Hyce, was not present at the time. I left the mules and horses there. I sold them to him, but I can not tell you the price of them; I have forgotten—I can not tell the price.

Q. "Mr. Hyce paid you for them? A. Yes, sir; I think it was about two weeks afterward he paid me.

Q. "Was it a fair price that you charged Vanosdel? A. I had a talk with Mr. Hyce and he told me any kind of a deal that I made with this man would be all right. He told me that he did not want to make any money on it himself. He said: 'If you sell any stock to my tenants, I don't want to make any money on it.'

Q. "You made the trade with Enoch Vanosdel? A. He bargained with me for the stock. I left them there and Mr. Hyce paid me for them afterward.

Q. "In dealing with Enoch Vanosdel did he strike you as a man who would be able to take care of his side of a trade. A. I did not see anything wrong with him any more than any other man."

Relative to the remainder of the account the testimony does not show an advantage improperly taken.

The witnesses for plaintiff state that advances were made of such provisions as he and his laborers needed.

There were also certain debts paid. The mere impression of certain witnesses that there were overcharges would not justify the conclusion that the amount advanced did not amount to, at least, $1500, the price and value of the property in controversy.

In Chevalier vs. Whately and Husband, 12 An. 561, a well considered case, the court held that contracts with weak-minded persons will be closely scrutinized and those who deal with them held to a strict standard of good faith.

The facts of that case make manifest the correctness of the conclusion regarding them.

The object of the suit was to annul two acts of sale executed, one on the 28th December, 1847, the other on the 26th February, 1848,

The vendor died in 1853 and the suits were brought immediately after his death.

The professed consideration of one of the sales was not paid at all.

The consideration seemingly of the other sale consisted of property which continued as before, and as they always intended it should continue, to belong to the vendor.

The vendor was an excessively weak-minded person, most easily duped and deceived.

The defendants were his relatives and he was living with them. Their influence as relations and protectors over one of his mental incapacity was obvious.

The court concluded that advantage had been improperly taken of the weak-minded vendor by his relatives, the vendees.

In the case at bar, the time which elapsed between the date of sale and that of suit is much greater.

The sale was not without consideration, and it was not notorious that the vendor was weak-minded, nor is the fraud charged obvious.

In case of Holland vs. Miller, 12 An. 624, the fraud was not established. The court says: "Contracts would rest on a very weak foundation, if those of the most solemn character could be avoided on allegations of insanity, when the proof thereof is contradictory.

"It would be necessary for the contracting parties, before the execution of the contract, to inquire into their mutual mental soundness."

These utterances apply to the case at bar.

In Baumgarden, Curatrix, vs. Langles, 35 An. 441: On the 31st December, 1877, Baumgarden sold to Langles.

Suit to annul the sale was brought on the 30th December, 1878.

One of the grounds was fraud, in that defendant being well aware of Baumgarden's mental weakness, took advantage thereof and that by threats, improper influences and false and fraudulent representations induced the vendor to sign the deed of sale.

The proof was not clearly established.

The court affirmed the judgment of the District Court rejecting the demand.

The law treats with special regard those unfortunate beings deprived of understanding by some providential dispensation.

It also treats with tenderness those whose mental weakness renders incapable of managing their affairs; but neither applies in the case

at bar, for the evidence does not establish that the sadly afflicted man who was interdicted in 1893 was insane in January, 1879, nor does it establish that he was at the last mentioned date notoriously weak-minded and incapable of giving consent to a contract for advances to enable him to cultivate his place.

The judgment appealed from is affirmed at appellants' costs.

No. 11,471.

W. K. BENDER (VICKSBURG BANK SUBROGATED) VS. JAMES R. McDOWELL.

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The substance of our jurisprudence on the subject is that a certain degree of sanctity attaches to the *act* of an attorney at law as an officer of court, which raises a legal presumption that it was authorized, and imposes on the client denying his authority the duty of supporting his denial with an oath, in order to overcome that presumption and put the opposite party to the proof of his authority.

But this rule is not exclusive of all others; and such an oath is not a condition precedent to the administration of any proof on the part of the party who denies the authority of the attorney. It is permissible for such party to go on the stand and testify on the subject.

APPEAL from the Seventh District Court, Parish of Madison. *Montgomery, J.*

A. L. Slack Attorney for Plaintiff, Appellant:

Where, in an action under R. C. C. 3547 to revive a judgment, the defence is that the attorney who represented the defendant and waived service of the petition, upon which judgment by default was confirmed, was unauthorized, such allegations must be supported by the oath of the defendant, as a condition precedent to setting up such want of authority in the attorney. "No contrary doctrine has ever been held." Dockham vs. Potter, 27 An. 74; citing and affirming, 9 M. 88; 10 M. 639; 8 N. S. 252-5; 4 R. 23; 12 R. 95-7; 1 An. 393; 3 An. 558; 5 An. 118; 10 An. 67; 24 An. 238; 20 An. 204.

A defendant in such a suit, who thus failed to verify such allegations by a previous oath as to their verity, should not be permitted to testify in his own behalf.

Evidence going to show the motive or inducement upon which a party acted, and what was said and done at the time, is not hearsay, but original evidence; so where the attorney of the plaintiff in the original suit offers to prove what the attorney of the defendant said and did in regard to his waiver of service of the suit sought to be revived, such testimony is not only in rebuttal, but is part of the *res gestæ;* and unqualifiedly so, when the attorney who acted for the defendant is dead, and can not testify in his own behalf.

An attorney can "waive the service of the plaintiff's petition." C. P. 177; 8 N. S. 34-5; 1 An. 398; 6 An. 709.

Waiver of service is a legal notice to the defendant of the pending suit, and "such waiver has the same effect as if citation had been served by the sheriff." Sexton vs. Brooks, 12 La. 596 So in the defence here, it is on a parity with a case in which a defendant sues to annul a judgment, on the ground that the return of the sheriff on the citation is false. 24 An. 332.

The burden of proof is on the defendant, for he must show "good cause why the judgment should not be revived." R. C. C. 3547; Levy vs. Calhoun, 34 An. 415.

The uncorroborated testimony of the defendant in his own behalf, against the acts of a dead man, is of the weakest kind, and not entitled to sufficient weight to warrant a judgment. Such testimony should be "strengthened by strong, or at least reasonable, additional independent proofs." 37 An. 97; R. C. C. 2288.

E. D. Farrar and *W. M. Murphy* Attorneys for Defendant and Appellee:

It can not be for a moment doubted that a party condemned without citation or hearing could sue to have the fact judicially determined, and yet more evidently that he may use the same fact as an exception to preserve his rights if sued. This he may do at any time the judgment so obtained is sought to be enforced against him for any purpose or in any manner, and even could it be held that he must bring such a suit within a fixed time, as it can not, by the express terms of Art. 612, C. P., nowhere and to no class of cases is more applicable the maxim, *Quæ temporalia*, etc. Conery vs. Rotchford, Brown & Co., 30 An. 692.

In an action to revive a judgment defendant is permitted to show want of citation or the nullity of the judgment resulting from any cause. And defendant, setting up the defence that counsel in the original suit had no authority to represent him, need not file an affidavit of want of authority in the attorney as a prerequisite to establishing that fact on trial. 30 An. 363; 27 An. 74.

The opinion of the court was delivered by

WATKINS, J. This is an action to revive the judgment rendered in the case of W. K. Bender vs. J. R. McDowell, on the 11th of June, 1883, of which the subrogee subsequently became owner; to which the defence tendered in the answer is, that no valid judgment had originally been rendered against him, as he had never been cited. The answer specially denies that he ever employed or authorized *any* attorney to represent him in said proceeding, either to make an appearance, to accept service, or in any manner whatever.

In the record appears a written acceptance of service of the suit in which judgment is sought to be revived, and citation waived, by Spencer & Lucas, as attorneys for the defendant. And on this acceptance and waivor a judgment by default was entered, which was made final on the day the judgment was signed.

When the defendant was offered as a witness in his own behalf, the plaintiff objected to his evidence on the ground that he could not be heard to testify as to want of citation, or that the counsel who represented him was unauthorized to represent him, because he had not made oath to the truthfulness of the averments of his answer.

This objection was overruled in the court below, and the plaintiff's counsel retained a bill of exceptions.

As this is the controlling question in the case, and it is presented at the threshold of the investigation, it must be disposed of preliminarily.

We note the concession stated in the brief of defendant's counsel and its qualification, which are as follows, viz.:

"Plaintiff's second objection was that defendant had not denied, under oath, the authority of counsel who pretended to represent him; and counsel relies confidently on the case of Dockham vs. Potter, 27 An. 74, and the authorities there cited.

"That case and the authorities cited simply decide that the party alleging want of authority in an attorney who appears in court must prove the fact of want of authorization. It is, of course, clearly settled in our jurisprudence, that when an attorney so appears, being a sworn officer of the court, the presumption is that he is authorized to represent his principal; and so strong is the presumption, that the court will not listen to a party who denies the authority, unless the denial is supported by an affidavit. But in the cases relied on, the state of facts existing were very different from the facts of this case.

"In Dockham vs. Potter, plaintiff sued to annul a judgment rendered against her on the grounds of want of citation, alleging want of authority in the attorney who appeared for her.

"She not only did not support her allegations by affidavit, but did not offer one word of testimony to disprove the authority.

"The court very properly held that her bare allegations would not outweigh the presumption of authority in the attorney.

"And in every case cited in that opinion, it will be found that where a party has not been permitted to overthrow the presumption of authority in his attorney, it was where the party simply relied on his naked denial of authority, without attempting to show the fact by sworn testimony."

The proposition of the plaintiff is, that when, in an action to annul a judgment, the defendant sets up as a defence, its absolute nullity

because it was not founded on citation, and in support of that contention alleges, in his answer, that the attorney who accepted service was not authorized, he is obliged to support that averment by his oath as to its truthfulness, as a condition precedent to making *any* proof of such want of authority on the part of the said attorney.

The leading case on the question is Dockham vs. Potter, 27 An. 74; and as plaintiff's counsel has reproduced in his brief pertinent extracts therefrom, we will quote them in their entirety as the best mode of presenting the view entertained by the court. They are as follows, to-wit:

"His authority to consent to the judgment * * * has not been denied under oath by the plaintiff, and, until thus denied, the defendant was not required to prove it. He, the attorney, was a sworn officer bound by his oath, as well as by the principles of integrity and honor which ought to characterize the profession of which he was a member, to act correctly in its pursuits. Thus situated, it is not to be presumed that he acted in the present case without authority. On the contrary, every presumption is in favor of his having pursued a proper course of conduct, unless the contrary should be suggested by the opposite party on affidavit. * * * Hays vs. Curry, 9 M. 88. And this has been the uniform doctrine of this court since that decision." Citing: 10 M. 639, Johnson *et al.* vs. Brandt; 8 N. S. 233, Dangerfield vs. Thurston; 4 R. 23, Bonnefoy vs. Landry; 12 R. 95-97, Fisher vs. Moore; 1 An. 398, Conrey vs. Brenham; 3 An. 558, Campbell vs. Arceneaux; 5 An. 118, Barnes vs. Profilet; 10 An. 67, Jeanney vs. Ricker; 24 An. 238, Succession of Massieu.

The court further said:

"That an attorney at law * * * is presumed to have authority to do so was expressly decided in the case of Dangerfield vs. Thurston, 8 N. S. 235, and nothing to the contrary has ever been held by this court. If the plaintiff desired this court to notice the suggestion that the attorney at law * * * had no authority to do so from herself and husband, she should have alleged the fact under oath, which she has not done.

"As additional authority I refer to Succession Patrick, 20 An. 204."

In an almost uniform manner of expression, the same precept has been announced in many preceding cases.

In Barnes vs. Profilet, 5 An. 117, it was said that "the attorney's

authority must be presumed until disproved," citing Hayes vs. Curry, 9 Martin, 88; Dangerfield's Executor vs. Thurston, 8 N. S. 234; Conrey vs. Brenham, 1 An. 398.

In Campbell vs. Arceneaux, 3 An. 558, it was said that "it is obvious that we can not permit a party to impugn the authority of the attorney upon a mere suggestion, etc. * * * Such a course is repugnant to all sound rules of law, and to the authority which courts are bound to accord to their officers."

In Succession of Massieu, 24 An. 237, it was said that "aside from the proof in the record, the authority of the attorney will not be presumed." Citing 9 M. 88; 10 M. 639; 12 R. 95; 3 An. 558; 5 An. 118; 10 An. 66.

In Succession of Patrick, 20 An. 204, it was said that "we must presume that the counsel was authorized to represent his clients, the contrary not being supported by oath."

Taken all in all, the conclusion is, that a certain degree of sanctity attaches to the *act* of an attorney at law, as an officer of court, which raises a legal presumption that it was authorized, and imposes on the client denying his authority the duty of supporting his denial with an oath, in order to overcome that presumption and put the opposite party to proof. We find no case which goes to the extent of holding that the making of such an affidavit is a condition precedent to the administration of any proof under his plea. We think it was competent for the defendant to be heard.

The district judge seems to have entertained a correct view of the law, and properly overruled the objection of plaintiff's counsel and admitted the evidence of the defendant as witness on the subject.

On the merits of the case, there seems little doubt of the *sufficiency* of the defendant's evidence to justify the judgment rendered in his favor.

His statement under oath as a witness is positive to the effect, that he had no knowledge of the *existence* of the suit until seven or eight years after its date; and only then became aware of it by accident.

That he never employed the attorneys who acted as his counsel in the case, and accepted service of the petition in his name. That he never had any conversation with them about it.

Counsel for plaintiff has, *ex industria*, collated quite a number of collateral facts and historical circumstances indicative of the employment of the said counsel. He also cites the circumstance of

both members of said law firm being dead, thus rendering it impossible for the defendant's testimony to be contradicted by them—insisting upon the rigorous enforcement of the rule so often applied in such cases, that such testimony is the weakest of all evidence, and entitled to little or no credit.

Accepting this view and giving it due weight, we do not feel at liberty for that reason to disregard the plain and emphatic statement of the defendant—however persuasive and cogent the argument against it may be.

His evidence is terse and unequivocal, and in no manner contradicted.

We see no reason for altering the decree of the court *a qua*.

Judgment affirmed.

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No. 11,433.

CITY OF NEW ORLEANS VS. C. S. DUFOSSAT ET ALS.

J. L. LEBOURGEOIS, THIRD PARTY.

In case the record discloses that a third person appealing from a judgment between other parties has no interest in the appeal, that the judgment appealed from in no way aggrieves him, and does not, as to him, form *res adjudicata*, the appeal will be dismissed on proper motion timely made.

APPEAL from the Twenty-first District Court, Parish of St. John the Baptist. *Rost. J.*

J. L. Bradford Attorney for Plaintiff and Appellee:

In a suit to partition lands, when there are no issues between the parties thereto save as to mode of partition, and the judgment orders a sale to effect partition, it is irregular to allow a suspensive appeal to a stranger, who comes in by protest and informs the court that, as a defendant in another suit pending in the same court, he has an interest in the land which will be prejudiced by the judgment and sale. R. C. C. 1289, 1384, 1390 and 2452; 43 An. 1118; 16 An. 251; 14 An. 181; 3 An. 597; 1 An. 284; 11 R. 16; 7 M. (N. S.) 575; 6 M. (N. S.) 350.

James Legendre and *G. V. Soniat* Attorneys for Heirs of Joseph Soniat Dufossat, Defendants and Appellees:

Appeals under Art. 571 of the Code of Practice are allowed only to third parties who have seasonably intervened and offered proofs of their pretensions before the rendition of the judgments.

District judges have exclusive jurisdiction in partition suits; the sufficiency *vel non* of evidence is entirely and exclusively within the discretion of the District Courts, and this court will not reverse such decrees, unless manifestly erroneous, unjust and arbitrary, and even in this latter case the remedy is not by appeal, but by *certiorari* and prohibition.

When a third party remains inactive and offers no proofs of his pretensions in the lower court, same can not be raised for the first time in a petition or motion of appeal.

Partition proceedings must be granted upon the application of the ostensible owners; they do not pass upon the real titles, but are mainly *ex parte* orders, and must be viewed with favor by our courts.

W. J. Waguespack, Curator *ad hoc* for the Minors Dufossat, Charbonnet and McClelland, Appellees:

A judgment of partition ordering a sale of the property sought to be partitioned can not aggrieve, and is not *res judicata*, *quoad* a third party claiming on adverse title, if said third party should afterward be decreed the real owner of the property. C. C. 2452; 1 An. 284; 3 An. 597; 16 An. 251, 280.

An appeal will be granted to a third party from an order of sale, where the property could *not*, after the sale, be wrested from the hands of third parties by a *new suit*, but it will not be granted where the property *could* be wrested from the hands of third parties by a *new suit;* in the first instance, the injury is irremediable; in the second it is remediable. 37 An. 118; 22 An. 200; 31 An. 823; 7 R. 232.

W. S. Benedict and *Robert G. Dugué* Attorneys for Jas. L. LeBourgeois, third party, Appellant:

A third person who is aggrieved by a judgment may appeal from it. C. P. 571; 27. An. 184; 23 An. 768; 17 An. 320; 30 An. 801; 25 An. 7, 8; 3 R. 113.

If the record does not show his appealable interest, the case will be remanded to enable him to show it. 2 R. 393; 7 N. S. 575; 6 An. 529.

The injury which gives the right to appeal need not be so irreparable that money can not compensate it. 33 An. 133, 560; 22 An. 512; 24 An. 154; 26 An. 603; 23 An 52; 14 An. 57; 12 An. 455.

A partition can not be ordered unless all the parties interested are properly before the court. 45 An. 1049, 1065; 12 S. Rep. 496; 17 La. 384; 4 An. 56, 260; 44 An. 170; 15 An. 251; C. C. 1329; C. P. 1024; 41 An. 1023, 1028.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

WATKINS, J. The plaintiffs and defendants, as appellees, unite in a motion to dismiss the appeal, which is prosecuted by Joseph L. LeBourgeois, a person not party to the suit and judgment, on the

ground that he is shown by the record to be without interest in the appeal, that the judgment rendered does not aggrieve him, and that same does not form *res adjudicata* as to his pretensions.

The *status* of this cause, in so far as it concerns this motion, is completely and accurately stated in State *ex rel.* City of New Orleans vs. Judge, 45 An. 950, wherein relators—who are plaintiffs here—demanded the revocation and annulment of the order of appeal which the respondent had granted in favor of the present appellant, on the ground that same was illegal and null.

In denying relief to the relator in the case we said:

"The case brought is an appealable one, and relator's complaint is that it has been appealed to this court, but improperly. The orderly and proper course for relator was to await action in this court on the appeal."

Availing themselves of this suggestion, doubtless, the appellees have filed this motion to dismiss.

Recapitulating, substantially, from that case, all the facts that are necessary for an understanding of the question for decision, we have the following, to-wit:

That the matter of dispute between the co-proprietors of a tract of timbered lands is, whether same is susceptible of partition in kind —plaintiffs' contention being that a sale is necessary, and the defendants disavowing the necessity of licitation of the property.

That in the judgment of the court sale was necessary and it so decreed—neither plaintiffs or defendants expressing any dissatisfaction therewith, or prosecuting any appeal therefrom.

That, notwithstanding the suit was not disposed of and remained untried for more than one year after it was filed, the appellant did not intervene and set out his demands, so as to have them examined and decided contradictorily with the parties plaintiff and defendant; but, on the contrary, appeared in open court on the day judgment was rendered and tendered a protest in writing, which is of the following purport, viz.:

"Joseph L. LeBourgeois comes into court for the sole purpose of calling its attention to the fact that the plaintiffs in this suit allege, in their petition, that the land which they seek to partition is 'the same land now the subject of a suit pending in this court, removed from the First District Court for the Parish of Orleans, in 1859, and numbered 713 on the docket of this court, in which the City of New

Orleans and Joseph Soniat Dufossat were plaintiffs and Joseph L. LeBourgeois and Felix Becnel were defendants.'

"This appearer further calls attention to the fact that he is the Joseph L. LeBourgeois referred to; that the plaintiffs and the defendants in this suit, all of whom claim, in their pleadings herein, to be the successcrs and legal representatives of the plaintiffs in suit No. 718, can not obtain a partition of lands, the title to which is shown by the record here to be in contest between themselves and others in another suit pending in this court, without making these others parties to their partition suit; that the said plaintiffs in this refuse to make themselves parties to the other pending suit, as they should do, and they so refuse in order to compel this appearer to forego the advantages which he enjoys as a defendant in the other suit, which he is anxious to try, but can not try, owing to the determination of the plaintiffs and the defendants in this suit not to make themselves parties to the other as aforesaid.

"Your appearer refers to the record in the said suit No. 718 and to the record in this suit, to substantiate the averments herein contained, and reserving all of his rights in the premises, he respectfully files this, his written protest, against any further steps being taken herein, until all proper parties shall be made as the law requires, and for general relief."

The purport of said protest is that the plaintiffs and defendants can not obtain a partition of said lands in this suit, because the title thereto is shown by the record to be in controversy between themselves and others in another pending suit, and they have not been made parties to the present suit.

That the court refused to allow this protest to be filed, and the protestant excepted and retained a bill of exceptions. Subsequent to the rendition of a final judgment decreeing a partition by licitation, from which neither plaintiffs or defendants appeal, the protestant obtained and prosecutes this appeal.

The following argument in favor of appellant's right we quote from his counsel's brief, viz.:

"Moreover, the sale is to be made at public outcry, after the usual advertisement, in the parish where he lives.

"Where will he find a purchaser for the property, if he wants to sell it, after these advertisements?

"Again, if he stands by and allows the sale to proceed, laches will

be imputed to him and he may lose his property, with no recourse except a suit for damages against persons who may, or may not, be able to pay them. If he merely protests, but does not enjoin, he will be compelled, after his title is recognized in the pending suit, to sue the purchaser to annul the sale, or to resist a suit in which the purchaser may set up his pretensions, or, if the purchaser attempts to take possession in the meantime, to sue to protect his possession.

"In any event, the judgment can only breed mischief and litigation. It was evidently obtained to stir up new litigation, to compel the appellant to bring a petitory action and resort to an injunction; tactics which this court will not countenance.

"This purpose is patent on the face of the record. No sane person interested in the land, interested, therefore, in having it sold to advantage, would dream of exposing it for sale with such an adverse claim outstanding against it; a claim which makes it unsafe for any one to buy, and impossible to expect the offer of a fair price.

"Minors claim an interest in it. They are the wards of the court, and the sale should not be permitted, if for no other reason than that their interest requires it to be postponed.

* * * * * * * * *

"Although joint owners can not be compelled to remain in indivision, a partition can only be allowed in the orderly course of judicial proceedings. All parties claiming an interest in the property must be brought before the court. Until they are in court, the partition can not be decreed. 13 S. Rep. 817, 821; 12 S. Rep. 496; 17 La. 384; 4 An. 53, 260; 44 An. 170; 15 An. 251; C. C. 1329; C. P. 1024."

And, in conclusion, his argument thus proceeds:

"We believe the prematurity of the action and the want of necessary parties are ample reasons to justify the reversal of the judgment, and we have, therefore, abstained from pointing out other defects, apparent on the face of the record, which invalidate the proceedings.

"The appellant prays the motion to dismiss may be denied, the judgment reversed and the suit dismissed."

We think it quite clear that appellant is without right or interest to interfere with the parties in the present litigation, because the judgment does not disturb his title to the property in the least, and a public judicial sale for purpose of effecting a partition *inter partes*, would not cause him any injury.

But granting, for the argument, all that appellant contends for, it is striking and evident, that it was his plain duty to have intervened and made his claim in season: and failing in this, he must take his recourse in some other and independent proceeding.

The motion to dismiss is well-grounded.

Appeal dismissed.

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No. 11,472.

L. F. MONTGOMERY ET ALS. VS. MARYDALE LAND AND LUMBER COMPANY, LIMITED, AND ALEX. BLANCHE.

BOARD OF COMMISSIONERS, FIFTH LOUISIANA LEVEE DISTRICT, WARRANTORS.

Half of the property was assessed in the name of the owner many years after his death, although, by the records of the clerk's office, it was made public that his succession was opened, the property inventoried and an executor appointed.

When the fact is known that the owner is dead and his succession is opened, the assessments should be made in the name of his "estate."

The certificate of a tax collector to the assessment roll applies, under the terms of the statute, only to those who are notified by publication.

A certificate to establish that notice was given by mail to a non-resident tax-payer will not be held conclusive. It must yield to absolute proof.

The evidence is conclusive that no sufficient notice was ever mailed to plaintiffs.

Statutes to divest title must be strictly pursued.

The requisite notice must be given according to statute.

Notice being a condition precedent to the validity of the sale, the absolute want of notice is not cured by the prescription of three or five years.

The deed of sale by the warrantor contained a stipulation of no warranty.

The buyer, not being aware of the danger of eviction, is entitled to recover the price paid.

APPEAL from the Seventh District Court, Parish of Tensas.
Montgomery, J.

R. H. Snyder, Jr., for Plaintiffs and Appellees:

An assessment of real estate which does not describe on its face or by reference to accessible public documents the property intended to be assessed is null and void. Wilson vs. Marshall, 10 An. 329.

It is indispensable that the assessment furnish the means of identifying the land assessed. Saunders on Taxation, 104.

The assessment is invalid unless it gives such a description of the lands that the parts of the government subdivisions belonging to the tax-payer can be ascertained and separated from the parts of the same subdivisions belonging to other persons. Person vs. O'Neal, 32 An. 228.

The legal assessment of realty owned in indivision by two or more persons requires that each owner shall be separately assessed with his undivided interest in the whole. Saunders on Taxation, 108; Hays vs. Viator, 33 An. 1165.

The assessment of realty in the name of a person long since dead, whose will has been probated in the parish where the property is situated, and where the tax sale was made, is null and void. Stafford vs. Mitchell, 33 An. 520; Carter *et al.* vs. City, 33 An. 818; Succession of Mercier, 42 An. 1139; Norres vs. Hays, 44 An. 912.

A tax sale made since the adoption of the Constitution of 1879, where no notice was given to the tax debtors, is absolutely null and void. Article 210 of the Constitution; Breaux vs. Negrotto, 43 An. 428; Norres *et al.* vs Hays *et al.*, 44 An. 912.

When it appears that the description on the assessment roll is too vague and indefinite to operate a conveyance of title or to serve as a basis of title, the assessment is null. Gibson vs. Hitchcock, 37 An. 214.

Article 210 of the Constitution solemnly declares that the property of an individual shall not be forfeited for the non-payment of taxes, unless notice shall have been first given to such individual.

Article 210 contemplates some effective notice, such as the mailing to and the receipt by the tax debtor of the notice.

This court has within the past year defined the legislative term "unknown owner," and has declared such person to be one whose postoffice address is unknown to the tax collector.

Clinton & Garrett Attorneys for the Defendants and Appellants:

As the main defence set up by the defendant company against plaintiffs has been adopted by the warrantors, and as those branches of the case will be fully presented by the warrantors, we, as counsel for the Marydale Company, will confine ourselves to the call in warranty, for the reason that if the warrantors prevail against the plaintiffs' demands, the result of this litigation would not affect the said Marydale Company.

Where there is a clause of no warranty in a deed, in case of eviction the vendee can recover the price paid, unless the buyer was, at the time, aware of the danger of eviction and purchased at his peril and risk. C. C., Arts. 2505, 2542, 1965; 5th Robinson's Reports, 76; 3 An. 326; 5 An. 314, 667, 684; 6 La. 550; 16 An. 45; 37 An. 374.

In order to escape liability to the purchaser for the restitution of the price paid, the vendor should, as a rule, affirmatively establish actual knowledge by the former of the danger of eviction, either by direct proof or by implication from collateral facts so strong as to be equivalent to positive evidence. See 37 An. 274; R. C. C. 2542, 2505, 1965; 3 An. 326; 16 An. 45; 17 An. 50; 5 R. 76; 5 An. 314, and cases cited in 37 An. 274; see also Meyer vs. Farmer, 36 An. 789.

In this case there is no evidence whatever that would go to show that under the plain provisions of our law the warrantors can escape the liability of paying the price and taxes, which the Marydale Company had paid for the property, in case of their title being annulled as derived from the Levee Board. To hold otherwise would have the effect of allowing the Levee Board to "get something for nothing," which would be a clear vio ation of our law in matters of sales of property.

The buying of "rights and pretensions" is somewhat in the nature of an aleatory transaction, when an inadequate price is paid in the hope of thereby acquiring something which may be of far greater value than the price, and the distinction between, and the true nature of such transactions can more readily be determined by the consideration paid than by any other.

In the instant case it is not declared in the act of sale that the vendee was aware of the danger of eviction, or that he purchased at his own risk and peril; nor is there any evidence in the record tending to show that the purchase was made under either of such conditions.

The Code, as construed by this court, goes so far as to extend protection to one who purchases, aware, at the time of the sale, that the thing sold belonged to another, even where there is exclusion of warranty. While it refuses by implication damages in case of eviction, it recognizes the equitable right to recover the price, unless it was excluded by formal stipulation, or the purchaser bought expressly at his peril and risk. 37 An. 274.

Elam & Dale, Attorneys for the Board of Commissioners Fifth Levee District, Warrantors, Appellants:

In 43 An. 877 the court says: 'The ground for illegality in the assessment complained of is that it was assessed to James Surget who died in 1856, and that his succession is still opened. The heirs have never been put in possession of the property of the estate. The plaintiff contends that the property ought to have been assessed to the heirs, as they accepted the succession unconditionally. The heirs are non-residents, and there is no evidence showing that they are in possession of the estate, as joint owners, or that there is any record of this fact, if it existed, in Jackson parish. The property was properly and legally assessed." 33 An. 816; 28 An. 240; 31 An 591; 38 An. 807.

An assessment according to the records was sufficient, though erroneous, provided the assessor had no information at his command by which to make a correct assessment. 42 An. 1127.

A different rule governs as to the validity of the assessment, when the informalities in the assessment are occasioned by the tax-payer than when occasioned by the assessor.

It is by law expressly made the duty of each tax-payer, whether as owner, agent or in other capacity, to give the assessor a list of the property, showing to whom it belongs, in what capacity it is held, a correct description of the property and the postoffice address of the tax-payer. If this legislative utterance is not to be regarded as an empty sound, the tax-payer should not to be heard to complain of an erroneous assessment, when such error has been occasioned by his neglect of duty, and when it is shown that the assessor has exercised due diligence to make a correct assessment. Especially ought this to be so when the tax-payers are non-residents, have no agents in the State, have abandoned the property and neglected their duty as to filing lists, showing owners and giving postoffice address, as in this case; and when the deed records show it to be in the name of persons not the owners.

The records the law requires the assessor to examine are not the succession records. Act 96 of 1882, Sec. 8.

The defendant company demands, in the event the tax title is annulled, that it recover judgment against warrantor for the purchase price. In the deed by

warrantor to defendant company it is stated: "It is expressly understood that this act shall have the force and effect of a quit-claim deed. This vendor only warranting as to such title as may be vested in it." The warrantor, therefore, if you hold the tax title invalid, is under no obligation to refund the price, as the company bought at its peril and risk (C. C. 2505), and waived all right to demand a return. Besides there is no law authorizing the warrantor to warrant the title, and as it did not have the power it can not be held in warranty.

The opinion of the court was delivered by

BREAUX, J. This is a petitory action in which the plaintiffs, alleging that they are the owners of "Cowslough" plantation, pray to be decreed the owners and placed in possession.

The property was acquired jointly by L. F. and J. J. Montgomery.

At the latter's death, in 1868, the title of one-half remained in L. F. Montgomery, and the title of the other half vested one-fourth in the widow and survivor in community of A. J. Montgomery and the other fourth in his children, eight in number.

His will was admitted to probate in Tensas parish, in 1868.

An inventory was made.

L. F. Montgomery and the widow of the testator qualified, under the will, as executors.

The property was assessed for the taxes of 1881, 1882, 1883 and 1884 in the name of L. F. and A. J. Montgomery.

It was adjudicated to the State of Louisiana in 1885, for the taxes of those years, and subsequently it was transferred by the State to the Fifth Louisiana Levee District warrantors.

The Marydale Land and Improvement Company, holding under the Louisiana Levee District answers that the property was legally assessed for many years prior to the adjudication to the State, during which plaintiffs failed to pay their taxes and to exercise any rights, of ownership.

It pleads prescription and called the Levee Board, in warranty, to defend the title, and asked, in case of its eviction, that it (the defendant company) recover judgment against its vendor for the price and taxes paid.

The co-defendant Blanche also, pleads prescription—that of two, three and five years, and prays for judgment against his vendor, the Marydale Company, for the price and taxes he paid, on the portion of land bought by him.

The defence of the warrantor is substantially the same as that of the defendant.

The "Levee Board" warrantors, in their answer, as against the defendant, the Marydale Company, deny that it is bound in warranty, and contend that it is not obliged to return the price in case of eviction.

The deed of sale by the Levee Board contains a clause of no warranty in case of eviction, and it is relied upon by it as being an effective bar to the demand of the Marydale Company, vendee, for the return of the price.

The record does not disclose with certainty that any notice was given to L. F. Montgomery to pay his taxes prior to the sale, either by postal card or publication.

The evidence of the notice is also uncertain as to the half of which A. J. Montgomery was the owner.

Judgment was rendered recognizing plaintiff's ownership of the property, and there was judgment for defendants against warrantors for the purchase price paid and a judgment against the plaintiffs for the amount of taxes paid by defendants on the property.

The terms of the judgment reserved in addition certain rights to the defendants.

From this judgment the defendants and warrantors appeal.

The following propositions, assailing the tax title, present the important issues of the case:

1. The assessment of property in the name of a person long since dead, whose succession has been opened, inventory made and executors appointed, in the parish where the property is situated and where the tax sale was made, is null and void.

2. A tax sale made since the adoption of the Constitution of 1879, without notice to the tax debtors, is null and void.

THE ASSESSMENT.

Although it must have been known that A. J. Montgomery was dead, the assessment of his property was made in his name.

His will was probated in 1868, executors were appointed to execute the will, an inventory had been taken. The proceedings were recorded in the succession record of the parish.

They were ample notice to the assessing officer that the co-proprietor of a large tract of land was no longer alive.

The property was sold under Act 96 of 1882, and the amending revenue act of 1884.

Under neither can sanction be found for assessing property in the name of the deceased after the assessor has become aware of the death of the owner.

The succession, so far as the record discloses, had not been accepted by the heirs; therefore the assessor could not be expected to assess the property in their names.

But the words "estate of" were essential under the circumstances to identify the property as required and to complete the assessment.

It has never been held, as contended in the case at bar, under the acts above cited in any case that the words "estate of" are of no importance in assessing property of a succession prior to acceptance by the heirs.

In Sewell vs. Watson, 31 An. 591, Justice White, for the court, said: "The property stood upon the public records as that of James H. Coleman, and was so assessed. It was vacant property, and the owner did not reside in the parish. The assessor, in listing the property for taxation, could have assessed it in no other way than as it stood on the records of the country, unless it be considered that it was his duty to be informed of facts not public, not to be ascertained from the condition of the property, or from its occupants, for it had none."

The inference is plain, if it was publicly known that the owner was dead the assessment should not have been made in his name under the revenue act of 1882.

By special enactment (not contained in the act of 1882) it is different under the act of 1890, which can not apply to this case. See revenue act of that year, Sec. 25.

The question received consideration in a well-considered case, in which an assessment made in the name of an owner who had been dead for ten years was decreed illegal.

The court states that the name of the owner had been formally notified to the proper officers, and was ascertainable from the archives of their own offices. Stafford, Executor, vs. Twitchell, 33 An. 524.

It is argued by warrantors' counsel that the case of Kent vs. Brown and Learned, 38 An. 807, is a comparatively recent utterance of the court upon the subject, and that it is conclusive upon the point under discussion.

The facts in that case are different from the facts in the case at bar, as made manifest from the following quotation taken from the cited case:

"We must take judicial cognizance of the state of war in which the country was then engaged; of the closing of the courts during several years; of the difficulty, and at times of the impossibility, of communicating between the parishes of Concordia and Carroll, and from the records it appears that no positive information could be had from the records of Concordia of the whereabouts, or as to the fact as to whether he was dead or alive. From the only sources of knowledge within the reach of the assessor, he had no alternative but to list the property in the name of that owner to whom it had been assessed, and who had paid the taxes thereon for years past. These circumstances, which are entitled to great weight, entirely remove this question from the rule or scope of the two decisions mainly relied on by plaintiff's counsel."

The two cases referred to are: The Stafford case, 33 An. 520, and the Hickman case, 35 An. 1086.

Neither of these cases was overruled by the Kent case, 38 An. 807.

The facts were different, and the court so states. The correct rule is indicated in Cosgrove vs. City of New Orleans, 33 An. 816.

The assessment was regular, for the property had been assessed in the name of an estate; there being no proof of record that the heirs had been placed in possession.

In the case at bar the records, which should not have been ignored by the assessor, years after the assessor's death, showed that the property was that of the estate of A. J. Montgomery.

It should have been assessed in those words, in so far as the property was owned by the succession. See also the Surget case, 43 An. 877.

We at this time pass the plea of prescription and take up the question of notice to the tax-payer.

Although this plea is urged as applying to both the informality in the assessment and the want of notice, we will hereafter decide it only in so far as it applies to notice, for it disposes of the case.

NOTICE TO THE TAX-PAYER TO PAY TAXES ASSESSED.

The Constitution, Art. 210, ordains that, "after giving notice to the delinquent in the manner to be provided by law."

That article, as touching the points involved, has been interpreted by this court in several decisions.

The leading case is that of Breaux vs. Negrotto, 43 An. 488, from which we quote: "The Constitution and Acts Nos. 77 of 1880 and 96 of 1892 require notice to be given to the tax delinquents. No notice was given. It was an essential prerequisite to the sale of the property," and approvingly Stafford's Executor vs. Twitchell and *In re* Douglas, 41 An. 765 are cited.

This conclusion was affirmed in Norres vs. Hays, 44 An. 912.

The tax collector did not, it seems, mail notice to L. F. Montgomery at the postoffice of his residence. The names were properly given L. F. and A. J. Montgomery, and would have bound the surviving partner had it been mailed to the postoffice of his residence. The assessment itself against L. F. Montgomery is legal and binding and the taxes are due.

The sheriff appended a certificate to the tax roll for the years for which the taxes were due, certifying that notice had been given as required.

Had he testified that the certificate was correct, his oath, together with the presumption that sustains the regularity of an officer's act, would have proved the notification, against which the mere denial of the tax-payer, as a witness, would not suffice to set it aside.

But the tax collector testified that he had sent the notice to another postoffice than that of the tax-payer's residence.

The notice to the other owners was equally as defective. It was addressed to A. J. Montgomery, and not "his estate," and mailed to that address, to be delivered at Canton, Miss.

The heirs not having accepted the succession, and being, as to the property, unknown, an advertisement in the name of the estate of A. J. Montgomery would have bound them. The notice to them was not in the required form, and the attempt to notify them failed.

Without further legislation, we are not authorized to hold otherwise than we have.

Plea of Prescription.

It is argued by counsel for warrantors that the plaintiffs had, long before the tax sales, abandoned the ownership and possession of the property.

That they had acquired a tax title, duly recorded, that placed plaintiffs upon inquiry.

That the purchase alone gave them (the warrantors) possession.

Our examination of the records does not satisfy us that the warrantors took actual possession.

The facts regarding the alleged abandonment of plaintiffs consist in their neglect to pay their taxes, and of their not being in corporeal possession.

These facts did not have the effect of impairing their rights as owners.

The notice is a condition precedent, the want of which is not cured by the prescription pleaded.

The notice was insufficient and entirely irregular, and as such, even the purchaser in good faith is without right to avail himself of a term of prescription less than ten years.

The following is one of the last utterances of this court upon this subject:

"Hence our opinion in Barrow vs. Wilson was error, to the extent of holding that, in respect to this notice, the prescription of three and five years was tenable." 48 An. 441.

RETURN OF PRICE BY WARRANTORS.

The defendants demand, in the event that the tax title is annulled, that they recover judgment against warrantors for the purchase price.

In the deed by warrantor to the Marydale Land and Lumber Company, Limited, it is stated:

"It is expressly understood that this act shall have the force and effect of a quit-claim deed. This vendor only warranting as to such title as may be vested in it."

The warrantors' contention is that they are under no obligation to refund the price, and they claim that the defendant company bought at its risk and peril, and waived, thereby, all right to demand a return.

The vendor who has received the price must return it, because it is in his hands without cause.

The purchaser has paid it in execution of a sale that is null.

The record does not disclose that the vendee was aware at the time of the sale of the danger of eviction.

The stipulation of no warranty is effective in relieving the vendor

from the payment of damages, but does not release him from the obligation of restituting the price.

Warranty of title is the rule, and always governs unless waived.

The express waiver may include the waiver of the restitution of the price, in case of eviction, and the sale made at the entire risk of the purchaser.

A waiver, however, silent as to the restitution of the price, does not exclude the obligation of returning the price in event of eviction, unless the purchaser had knowledge of the causes of eviction.

In other words, a no warranty of title clause in a deed, without knowledge on the part of the vendees of the causes of eviction, and without an express waiver of the return of the price, leaves the vendee, after eviction, a creditor for the price paid.

AN ESSENTIAL.

The obligation of the tax-payer to contribute to the expenses and necessities of the government, when enforcement becomes necessary, is subordinated to certain requirements that must be observed in order to divest him of his property.

In case of formality, not of the essence, he has no remedy to recover after his property, under a tax title, has passed into the hands of an innocent purchaser.

The decisions heretofore have treated notice as an essential.

We adhere to the principles heretofore enunciated.

We therefore must affirm the judgment.

It is ordered, adjudged and decreed that the judgment is affirmed at appellants' costs.

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No. 11,479.

MRS. ANNA CHAPOTON VS. HER CREDITORS.

The opponent to the homologation of the tableau of distribution of the syndic moves to dismiss the appeal of the syndic from the judgment amending and homologating his tableau.

The decision appealed from reduces the amount of three of the claims, as carried on the tableau of distribution.

The decision of the District Court upon each of the claims, carried on the tableau, is a separate judgment in favor of each creditor.

This judgment must remain undisturbed, if the creditors accept it as correct and

do not choose to appeal from the judgment reducing the amount. The syndic is without authority to appeal, for he is without interest, and is not aggrieved. The appellees whose claims were reduced being quiescent, the syndic is without authority to prosecute an appeal in their behalf.

APPEAL from the Fourteenth District Court, Parish of Iberville. *Talbot, J.*

Alex. Hebert Attorney for Syndic, Appellant:

Interest must be computed from the date of the claim to the time of filing the final account of the syndic, and not simply from the date of the claim to the day of the sale of the effects of the insolvent. 9 La. 268; 3 An. 387; 30 An. 716.

Ernest T. Florance Attorney for John G. Spor, Opponent and Appellee:

Interest ceases to run against an insolvent estate upon a special privilege, from the date of sale of property subject to the privilege. 12 Robinson, 404, Collier vs Creditors.

A syndic, who is himself a creditor with first special privilege, can not, by failing to provisionally distribute the estate so as to extinguish his privilege, compel the estate to pay interest on his claim up to the final distribution.

ON MOTION TO DISMISS THE APPEAL.

The opinion of the court was delivered by

BREAUX, J. The syndic of the creditors of Mrs. Anna Chapoton having, in that capacity, filed his tableau of distribution and prayed for a judgment of homologation, it was opposed by J. G. Spor, a mortgage creditor of the insolvent, on the grounds that the interest allowed A. Wilbert's Sons Lumber and Shingle Company is illegal; that the sum allowed to the notary and experts was excessive, and that C. Joubert & Co. should be charged with the expense incurred in selling the goods on which they had a privilege.

Upon the trial of the opposition the court *a qua* amended the tableau by rejecting items for interest allowed to the A. Wilbert's Sons Lumber and Shingle Company and by reducing the fee of the notary and by charging C. Joubert & Co. with certain costs amounting to $20.

From the judgment thus amending the tableau of distribution only the syndic of the creditors in his official capacity, prosecutes the appeal. The creditors affected by the amendment have not interposed any objection whatever on appeal.

The opponent Spor, an appellee, moves the court to dismiss the appeal, for the reason that the syndic has no interest in the judgment appealed from; that he is not aggrieved, and that he is without any right to appeal.

It is elementary that an appellant must have an interest in the controversy or substantial rights involved therein in order that he may sustain an appeal.

A syndic is authorized to appeal to have a judgment reviewed which affects his rights as a syndic of the creditors he represents.

The syndic in the case at bar has no appealable interest. He is not concerned as syndic in the claims of creditors.

Each creditor whose claim has been approved by the judgment of homologation is a separate judgment creditor.

The creditors *inter se* are the parties litigant. Their respective claims are settled contradictorily on the tableau. The judgment is binding upon all the parties who do not appeal.

The syndic, being without interest, is without authority to interfere, that a judgment may be increased in behalf of a creditor who does not complain.

The judgment in effect increased the *residuum* applied to the mortgage indebtedness. To this no opposition is interposed by the creditors whose claims were reduced.

The syndic *en concurso* proceedings can not be concerned for or against the judgment in so far as it reduces or disallows the claims of a creditor. The creditors have all rights needful to the protection of their interest. They can not be subjected to litigation on appeal, because he the syndic, assumes that one creditor should receive a larger amount than that allowed, though he, the creditor, does not appeal and files no complaint against the correctness of the judgment.

The creditors are aggrieved and not the estate or the syndic.

It is not possible that the common fund will be increased by any action of the syndic on appeal.

The subject was discussed in the case of Payne vs. Dejean, 32 An. 890, in which an administrator sought to sustain an appeal from a judgment amending an account of administration.

The official capacity of the defendant did not enable her to obtain a review of the judgment.

She represented on appeal that a claim due her personally was illegally disallowed.

The court held that as to that claim she was not in her official capacity a representative of the creditors and that if she was aggrieved by the judgment her remedy was by appeal in her personal right.

Her appeal as administratrix was dismissed. The court in support of the ruling cited decisions in appeals from judgment homologating tableaux of distribution in insolvency proceedings as in point.

The appeal by the administrator and syndic is treated as similar in each case.

In one of the cited cases, that of Beer & Co. vs. Their Creditors, 12 An. 774, in which the case of Girod vs. Creditors, 2 An. 548, is followed, the principle is enunciated that "in the general administration of the effects of the insolvent, the syndic represents the creditors;" but *en concurso*, the creditors act for themselves, each claim is a separate judgment belonging to the creditor.

The syndics are chosen to attend to the interests of the creditors of the insolvent and represent the mass of the creditors and may take such legal steps as are needful to protect the assets and legally add to the amount to be distributed.

It is nowhere stated that they are authorized to take appeals and control them in the interest of creditors who do not complain.

The syndic being before us in his official capacity and not in his individual right, the appeal is dismissed.

It is not possible, in this appeal, in which he appears only as syndic, to condemn him to pay the costs individually.

The claim for costs of appeal can not now be determined as between the syndic personally and the opponent appellee.

The question can be decided contradictorily between them. They are not both before this court in this appeal.

It is ordered, adjudged and decreed that the appeal in this case be dismissed.

No. 11,453.

THE STATE OF LOUISIANA VS. J. W. MURPHY.

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108 509

The State appeals from a judgment sustaining a motion to quash an indictment charging the accused with having committed forgery.

The statute under which the indictment was framed does not comprehend the act of altering an account independently of, and without reference to, any receipt, or intent to use it as part of a receipt or acquittance.

When in a case of forgery the instrument forged does not, on its face, appear to be valuable or adapted to work a fraud, extrinsic matter must be averred to enable the court to see its fraudulent tendency in matter of law.

APPEAL from the Tenth District Court, Parish of Rapides.
Andrews, J.

M. J. Cunningham, Attorney General, and *Phanor Breazeale*, District Attorney, for the State, Appellant:

The Southern Pacific Railroad transported certain furniture consigned to the Woodfine Furniture Company, represented by the defendant, Murphy. One piece, viz, a bedstead, was slightly damaged; Murphy had it repaired by Bragg & Rial, cabinet makers, and made out an account against Murphy, or the company which he represented, for the one dollar; Murphy changes the figure one to the figure five, making the account five dollars instead of for one dollar; he presents this account so altered and changed to the Southern Pacific Railroad Company, who has to pay for the work, and demands payment.

This is forgery. It is not obtaining money under false pretences, because the agent of the railroad does not pay the bill, preferring to investigate; and learning from Bragg & Rial the fact that they had made the account out for only one dollar, the grand jury preferred the charge of forgery, etc., against Murphy.

An open account is a "bill" in the intendment of the statute. R. S., Sec. 833.

It was intended in this instance to be a "receipt for money;" it was a "bill * * * for money or goods;" it was a "discharge * * * upon the payment of money;" it was to be a "receipt for money;" it was a "bill for money or goods." It was altered and forged so as to defraud the railroad out of four dollars. After committing the forgery he published it as a true "order, acquittance, discharge or receipt," with the guilty knowledge and with the fraudulent intent denounced by the statute.

It is an "instrument of writing," the altering or changing of which, if done with intent to defraud or injure, constitutes forgery.

The instrument declared on is not a *nudum pactum* as defined by Wharton, p. 584, Sec. 696.

It is neither palpably nor absolutely invalid, nor can it be said that under no circumstances could it be proof in a legal procedure.

On the contrary, it is valid on its face, can be the basis of a suit at law, and was intended and calculated to deceive, and to defraud and injure. Wharton, Secs. 696.

The entery of a false item in a pass book as commonly used between a grocer and his customer is forgery. Wharton, Sec. 664.

Edwin G. Hunter Attorney for Defendant and Appellee:

"Where the instrument is an account or a mere request for the payment of money, it is not subject to an indictment for forgery. In such a case if the money is paid, the indictment should be for obtaining money under false pretences; if the money is not paid, it should be for an attempt to obtain money under false pretences." Archibald, Vol. 2, p. 875; W. C. L., Vol. 1, Secs. 682, 662.

2. "The principle is a familiar one, that every indictment must show affirmatively the commission of an offence." Bishop, Vol. 2, Sec. 459.
3. It must appear upon the face of the indictment, by proper averments, that the instrument forged is of the particular kind prohibited by the statute upon which the indictment is founded." Bishop, Vol. 2, Secs. 414, 415; W. C. L., Vol. 1, Sec. 728; 30 An. 557, 570, 571; 37 An. 292.
4. Criminal statutes can not be extended to cases not included within the clear import of their language. 37 An. 780.
5. The document set out in the indictment is a *nudum pactum*. It is without capacity to injure any one—it is not covered by the statute, never was at any time, under any law, subject to forgery. American and English Encyclopedia of Law, Vol. 8, p. 489; W. C. L., Vol. 1, Sec. 703; Bishop, Vol. 2, Secs. 508. 511; 30 An. 562, 563, 567.
6. In this State there is no such offence as "publishing and uttering as true a false and forged document. The statute makes it a crime to alter and publish," etc. 30 An. 572, 573.
7. Under the statute the indictment must charge that the intent was to defraud some person, or body politic or corporate. The indictment does not charge whether the uttering and publishing was done to defraud "any person, or body politic or corporate." R. S., Sec. 833; W. C. L., Vol. 1, Sec. 716; Bishop, Vol. 2, p. 207, Secs. 420, 421.
8. Where the forgery is charged to consist in the insertion of figures or words in a genuine document, the indictment must distinctly set forth the position of the inserted words, so that their effect upon the original meaning of the document may appear. Where the entire document is charged to be a forgery, this particularity is not required. W. C. L., Vol. 1, Secs. 735, 728; American and English Encyclopedia, Vol. 8, 506, 520.
9. The crimes charged in this indictment are separate offences and can not be charged in one indictment, unless in separate counts. W. C. L., Vol. 1, Sec. 712; 20 An. 557; 38 An. 202.
10. Taken as a whole, this indictment is too vague and uncertain to serve as a foundation for a prosecution for forgery. A document may be altered and published without being forged, and the allegations in this indictment and the document, set out as the basis for the charge, all show that there can be no forgery in this case. The document is not susceptible of being forged. It does not come within the statute; it is signed by no one, it could deceive no one, it does not amount to even a request for money or goods and is absolutely without capacity to injure any one. It is not a document known to the law. In fact, it is a worthless and harmless piece of paper and can not be tortured into the "bill" contemplated by the statute.

    A party can not be tried for the forgery of an account, even if an account was included in the statutes, on an indictment charging him with the forgery of a bill. Bishop, Vol. 2, Secs. 414, 415; W. C. L., Vol. 1, Sec. 728; 30 An. 557, 570, 571.

The opinion of the court was delivered by

BREAUX, J. The following propositions are those principally relied upon by the defendant in support of the ruling of the court *a qua*, maintaining the motion to quash and ordering the indictment quashed:

That the writing charged to have been forged is not included within the operation of the statute, under which the indictment was framed.

That the indictment does not, on its face, show any legal validity. That the indictment contains no averment which could give the instrument any force and effect beyond what the writing itself contains.

The defendant was charged in the indictment with having fraudulently forged, changed and altered a certain bill for $1 as follows, to-wit:

ALEX., April 16, 1893.

Woodfine Fur.:

Bought of Bragg & Rial,

April 5, repairing on bedstead $5.

The indictment further sets forth that the bill had previously been made out for the sum of $1 by the said Bragg & Rial; that it had been thus forged for the purpose of obtaining the "sum of $4.50 of the value of $4.50 from the Southern Pacific Railroad Company through their agent, H. B. Chase."

It is further charged that knowing it to be a forgery the defendant falsely, fraudulently and feloniously published and uttered the bill as true by demanding payment of the same from the Southern Pacific Railroad Company, with intent feloniously to defraud.

The pertinent part of the statute upon which the indictment was drawn reads: That whoever shall forge, counterfeit or alter any public record, any certificate or attestation of any public officer, in any matter wherein his certificate or attestation is receivable and may be taken as legal proof, any charter, deed, will, testament, bond, letter of attorney, policy of insurance, or *bill of exchange* and promissory note, order, acquittance or discharge for or upon the payment of money or delivery of goods, any acceptance of a *bill of exchange*, or any indorsement or assignment thereof, or promissory note for the payment of money or goods, or for any note, *bill* or security for money or goods, or shall alter or publish as true any such false, altered, forged or counterfeited record, certificate or attestation, charter, deed, will, testament, bond, letter of attorney, policy of insurance, *bill of exchange*, promissory note, acceptance, indorsement, assignment, order, acquittance, discharge or receipt. (The italics are ours.)

The word "bill" inserted in the section of the statute, without the

expressed qualification of exchange, is not the word "bill" defined by lexicographers as conveying an account of charges and particulars of indebtedness by the creditor to his debtor.

The words " of exchange " are not repeated, but are made evident as qualifying terms by the words following, clearly conveying the meaning that a bill of exchange is the instrument referred to in the statute.

Such false, altered, forged or counterfeit bill of exchange refers to the word "bill" as well as to the words "bills of exchange," previously expressed in the section, and does not include in the denunciation the act charged in the indictment.

For the purpose of this case, it may be conceded that "open account" and bill are convertible terms and that a statute denouncing the act of altering a bill would include within its intendment the forging of an account.

We do not read the statute, under which this indictment was found, as authorizing the prosecution in this case.

The writing forged was evidently intended to serve for a receipt in the event the money had been paid.

Upon that hypothesis, it is argued, on the part of the State, that the act comes within the intendment of the statute.

The statute denounces the forging of an acquittance, which is in effect a receipt; and covers within its terms the forging of a receipt.

In answer to the proposition that the writing forged constitutes forgery, because an attempt was made to use it as a receipt, two grounds suggest the invalidity of the indictment.

In the first place, the defendant is not charged with having forged a receipt, nor with having forged the writing with the intent of obtaining the amount on it as a receipt.

In the second place, the instrument does not sufficiently appear as being, on its face, within the meaning of the statute, and the averments of the indictment do not make it appear that the alleged forged instrument was one intended by and described in the statute.

On the second ground also, the judgment appealed from is legal.

If the incomplete instrument of writing can be made complete by averments, it can not form the ground of a prosecution in its incomplete state.

An instrument to be the subject of forgery must be capable, if genuine, of being proof in legal process.

The writing in this case of itself, unexplained, unconnected with any other fact, is not admissible in evidence to charge the defendant.

The meaning of the transaction does not appear from the instrument itself.

While it is contended that the purpose was to defraud the Southern Pacific Company, its name does not appear in the writing, nor is it stated how it was purposed to defraud this company, nor is it alleged how it was possible to obtain the amount, or why such a payment was expected.

The company is not represented to have been at all indebted to any of the parties named, or that there was the least obligation on the part of the company to pay any amount whatever.

In case of an account or a proposed receipt, there could not be a fraud unless a debt existed. Wharton's Criminal Law, 9 Ed., p. 740.

The relation of debtor and creditor or the responsibility of some one to pay an amount may not appear in the writing and yet exists.

But it can not be proved unless alleged.

Upon that subject, Mr. Wharton says (p. 740):

"Where an instrument is incomplete on its face, so that as it stands it can not be the basis of any legal liability, then, to make it the technical subject of forgery, the indictment must aver such facts as will invest the instrument with legal force. Thus, where an indictment charged that A did feloniously and fraudulently forge a certain writing, as follows: 'Mr. Bostick, charge A's account to us, B and C.' with intent to defraud B and C, it was that the indictment was not valid without charging that A was indebted to Bostick, as there could be no fraud unless a debt existed."

The account was ineffective on its face, against the Southern Pacific Company, and no attempt thereby appears to have been made to charge that company, either in the account as originally made or as altered.

The indebtedness may be proved *aliunde*. To admit the proof and give legal force to the indictment it must aver such facts as will invest the instrument with legal efficacy.

"Where an instrument is not on its face sufficiently full to be a receipt, the defect may be supplied by showing a course of dealing between the parties in which it is understood to be and treated as such. This extrinsic matter must appear both by averment and proof."

Forgery consists in falsely making or materially altering or uttering with intent to defraud a note or other instrument in writing, which, if genuine, might be of legal efficacy or might be the foundation of legal liability.

Assuming for the discussion that the account forged is genuine, it is not *per se* of legal efficacy against any one without additional averments in the indictment setting forth the facts connected with the transaction.

This writing is not within the statute and has no legal force; unexplained, it does not enable the court to determine its fraudulent tendency in matter of law.

The judgment appealed from is affirmed.

No. 11,477.

ERNEST TROEGEL VS. FRED. D. KING, JUDGE.

The relator sues for peremptory writs of *certiorari* and *mandamus* under the supervisory jurisdiction of this court.

The appeal was returnable to the Circuit Court of Appeals.

The Circuit Courts of Appeals are vested with authority to issue writs of *mandamus* prohibition and *certiorari* in aid of their appellate jurisdiction.

If the relator has a right to relief he must apply to the court in which the appeal is lodged, the only court having jurisdiction of the questions propounded in his application.

APPLICATION for *Certiorari* and *Mandamus*.

A. B. Phillips and *B. R. Forman* Attorneys for Relator:

Where there is a judgment for money against one defendant who does not appeal the other can not appeal suspensively without giving bond as required by C. P. 575, exceeding by one-half the amount of the judgment. The insurance company, the defendant, condemned to pay $1144.02, is not an officer of the court, nor is the money in the hands of the court, and the district judge has no authority to order a suspensive appeal on either defendant giving bond in a sum less than that required by law, and it was the duty of the district judge to rescind the illegal order and to issue execution. C. P. 575; Marshal vs. Grand Gulf Co., 5 An. 360; Montan vs. Whitley, 12 An. 175; State *ex rel.* Bankhead vs. Judge, 22 An. 35; Leblanc vs. Suc. Massieu, 27 An. 326; State *ex rel.* Cientat vs Judge, 32 An. 814; citing 4 An. 3; 5 An. 518; 21 An. 44, 55, 114; State *ex rel.* Gill vs. Judge, 34 An. 90; Demarest vs. Bierne, 36 An. 751.

Respondent Judge in *propria persona* cites:

Suc. of Clark, 30 An. 801; approvingly cited in Pasley vs. McConnell *et al.*, 38 An 470; State *ex rel.* Durand vs. Parish Judge, 30 An. 285, 286; Suc. of Edwards, 34 An. 219; Brewing Co. vs. Boebinger, 40 An. 278.

The opinion of the court was delivered by

BREAUX, J. The relator seeks, by the interposition of the writs of *certiorari* and *mandamus* to compel the respondent to rescind his order for a suspensive appeal.

The appeal was made suspensive on a bond for an amount sufficient to pay costs.

The record of appeal is now lodged, under the order of appeal issued by the respondent, in the clerk's office of the Court of Appeals.

The controversy involves an amount of eleven hundred and forty-four dollars, in the hands of the agent of the Manhattan Mutual Life Insurance Company.

The relator claimed to be the owner of that fund.

The testamentary executrix of the succession of August Bernau also claims the amount.

The insurance company is represented as being a mere stakeholder, with no interest save to obtain a valid and sufficient receipt.

The relator, plaintiff in injunction, sued out a restraining order to prevent the executrix from receiving the amount, and directing the agent of the insurance company not to hand over the amount in contest to the executrix.

He prayed for judgment making the injunction perpetual and recognizing him as owner of the amount.

There was judgment for plaintiff Troegel, and against the defendants, decreeing that plaintiff was entitled to the amount of the life policy, in New York exchange, in the sum before stated.

On application of the legal representative of the succession of August Bernau, for a suspensive appeal returnable to the Court of Appeals, respondent granted it, and fixed the bond at two hundred dollars.

The respondent returns that there was no moneyed judgment pronounced.

That in granting the appeal on that bond he was governed by the principles enunciated in Succession of Clark, 30 An. 801, approvingly cited in Pasly vs. McConnell *et al.*, 38 An. 470; State *ex rel.* Durand vs. Parish Judge, 30 An. 285; Succession of Edwards, 34 An. 219, and Brewing Company vs. Boebinger, 40 An. 278.

This court has no authority to make the writs sued for peremptory.

The amount is within the jurisdiction of the Court of Appeals, and the appeal is now before that court.

It has authority to issue writs of *mandamus*, prohibition and *certiorari* in aid of its appellate jurisdiction.

The question involved in this application for *certiorari* and *mandamus* relates to the requirement to perfect an appeal before that court.

The proceeding is within its control and jurisdiction.

That power was recently interpreted as exclusive.

It was determined that the Circuit Court of Appeals to which an appeal is granted is not only competent, but the only court having jurisdiction of such issues.

In the case of State *ex rel.* Sample vs. Judge, 43 An. 986, the complaint was, as in the case at bar, that the district judge should have required a bond for one-half exceeding the amount of the claim.

The relator applied to this court to compel the judge to rescind his order.

This court decided that the question, the amount involved being less than two thousand dollars, was not within its jurisdiction, and that the relator was without right to writs from this court in aid of the appellate jurisdiction of the Court of Appeals.

The court, in that case, refers to Arts. 95 and 104 of the Constitution as absolutely controlling in the matter involved.

The principles laid down in that decision are not assailed, and no argument advanced in the case at bar bears against their force and correctness.

The authority of that decision controls the case at bar.

It is similar in all important respects.

It is not possible to difference the two cases, in so far as relates to the proposition of law involved.

As in the case cited, the relator has no rights under the supervisory powers of this court, and if he has any rights, he must apply to the Court of Appeals in which the appeal is lodged.

The writ *nisi* issued in the case at bar is rescinded, and the application for writs of *certiorari* and *mandamus* is dismissed at relator's costs.

No. 11,457.

STATE OF LOUISIANA VS. WM. KYE.

"Shooting into a dwelling house" is the crime charged.

Shooting in the house at a person, in the house, was the proof.

New trial was granted by the trial judge, because the proof did not establish that the crime charged had been committed.

The ruling is sustained.

The proof of shooting in a house, at a person, who is also in the house, is not the proof required to show that a person shot at a dwelling house, there being persons therein.

APPEAL from the Second District Court, Parish of Bossier. *Watkins, J.*

M. J. Cunningham, Attorney General, and *A. J. Murff*, District Attorney, for the State, Appellant.

J. A. Snyder for Defendant.

The opinion of the court was delivered by

BREAUX, J. The defendant was indicted for having wilfully and feloniously shot *into* a dwelling house in violation of the statute denouncing as an offence the shooting *at* a dwelling house.

The jury returned a verdict of guilty as charged.

The defendant moved for a new trial on the ground that the indictment charged the defendant with shooting into a dwelling house, and not with shooting at a dwelling house.

The court granted the new trial.

The district attorney excepted to the ruling, and from the judgment granting a new trial the State prosecutes this appeal.

The trial judge incorporated the statement in the bill of exception reserved; that the evidence showed that the defendant and others had a difficulty; that the shots were fired at indivduals in the room in a dwelling house, and that they were not fired at the house or into the house.

The court did not decide that the bill of indictment was illegal, but granted a new trial.

The court states the shooting was in the house at a person, and not a shooting at the house or into a house.

The question propounded for our determination is:

The defendant being charged, as before stated, can he be sentenced for having shot at some one in a dwelling?

There was a shooting at persons; not a shooting at a dwelling house, a different crime from that denounced by the statute under which the indictment was framed.

In shooting at a dwelling house the effect is directed toward the dwelling, and the inference, unavoidable, is that the person shooting is not in the house.

In shooting at a person in a room of the house the environment can no longer be the same, nor is the object directed toward the house in the sense of the statute.

Shooting by one in a dwelling may be directed toward some one away from the house—in the road or street, for instance.

He would not thereby violate Sec. 8 of Act of 1870 any more than he does violate it in shooting while in the dwelling a person who is also in the same dwelling.

The proof of shooting in a dwelling can not be made the equivalent of shooting at a dwelling.

They are distinct acts not embraced in one statute, but denounced in different statutes as distinct crimes.

The ruling is correct.

Judgment affirmed.

No. 11,435.

HERMITAGE PLANTING AND MANUFACTURING COMPANY VS. FREDERICK HIGGASON.

In a possessory action, where the plaintiff annexes a deed to his petition, made a part thereof, for the purpose only of showing the nature of the possession, that fact will not impress the action with the character of a petitory one.

In a possessory action only the fact of possession and the action thereof can be considered.

If the deed contains a resolutory condition, the defendant in the possessory action has no right to offer evidence as to the happening of the condition which destroyed the deed. Nor has he the right, while the plaintiff is in possession of the property, to determine the fact of the happening of the condition and to violently disturb his possession.

APPEAL from the Twentieth District Court, Parish of Ascension. *Guion, J.*

Edward N. Pugh Attorney for Plaintiff and Appellee:

1. Possession of immovable property, both under the common and civil law, is highly favored, and the rights of the possessor are strictly safeguarded. Even a trespasser is protected in his possession until his trespass is established at the demand of one who shows some better right in himself in a suit regularly brought. To all others, "*Possideo quia possideo*" is a sufficient answer. 37 An. 117; C. P. 46, 47, 49, 50, 52, 55; C. C. 3419, 3454, 3455; 16 La. 414; 41 An. 952; 7 N. S. 488; 7 La. 415; 32 An. 701; 11 An. 512; 44 An. 819, 517; 34 An. 1158; 119 U. S. 608; 142 U. S. 280, 449; 14 An. 34, 783.
2. The requirements of the law justifying plaintiff's suit are judicially admitted by defendant to be fulfilled. No inquiry into title or other matters is admissible, and the allegation of plaintiff that he is owner does not change the cause of action, which is determined by the prayer of the petition. (*a*) 7 N. S. 488; 10 La. 140; 34 An. 896, 1055; 7 La. 415; 32 An. 701; 119 U. S.; 13 La. 237; 10 An. 518; 6 La. 559; 2 An. 225; 14 An. 783. (*b*) 16 La. 44; 37 An. 241; 1 R. 109; 10 An. 160; 20 An. 69; 21 An. 856; 25 An. 166; 41 An. 705.
3. Plaintiff was in possession. Defendant went upon the land and destroyed the railroad bed—he ignored the existence of the courts, which were open to him to assert his rights, and took the law into his own hands. "The law jealously protects the possession of property against invasion and violence. It punishes with severity the trespasser, although he may believe he has some right which he can enforce by violence. Public order and the highest interest of society require that no violence shall be done to one in peaceful possession of property. As against the lawful owner the possession of immovable property must be protected against the unlawful disturbance of his possession." 44 An. 819, 516; 119 U. S. 608; 142 U. S. 280, 449; 34 An. 1158, 896; 1 R. 140.
4. Contracts subject to resolutory condition are in full force and effect until set aside by law or by mutual consent—neither party can predicate his acts upon the theory that he is entirely right in his interpretation of the obligations arising from a contract, and that the defendant or the other party is entirely wrong. In this case there is a dispute as to whether or not the contract has been violated. C. C. 2046; 27 An. 113; 31 An. 237, 169; 44 An. 516.
5. Plaintiff's domicile is New Orleans. Defendant, by his illegal acts, can not force plaintiff to litigate in Ascension, before defendant's court, issues which could only regularly be tried at plaintiff's domicile. Wrongful and illegal acts can not vest the court with jurisdiction, and the manner and form which defendant elects to present their issues can not change the result. The accidental fact that their issues came up by way of reconvention can have no influence or bearing in depriving plaintiff of the right of being sued at his own domicile. Defendant can not do indirectly what he could not do directly, and reap an advantage from his illegal acts. C. P. 162; 7 N. S. 488; 34 An. 1055; 32 An. 74; 6 An. 241; Black on Jurisdiction 43, p. 117; 124 U. S. 146.

G. A. Gondran, Paul Léche and R. N. Sims Attorneys for Defendant and Appellant:

1. In a suit for the judicial recognition of an alleged conventional right of servitude of way, coupled with an injunction to prevent the defendant from obstructing the use or enjoyment of said right of way pending the suit, the

defendant—on proper allegations to that effect and on showing by a counter letter or writing executed and signed by the plaintiffs, annexed to and made part of his answer, that plaintiff's position does not set forth correctly or truly the *nature* of their title to the servitude claimed but that said alleged right of way over defendant's land was the subject of a commutative contract between the parties with a resolutory condition expressly attached thereto—is entitled to set up as a defence to the action plaintiffs' failure to comply with their obligations and to pray for the annulment of the contract on *that issue*. C. C. 2046 2047; C. P. 20; 14 An. 427; 12 Rob. 472.

2. The injunction obtained by plaintiffs does not constitute the suit, but is a mere incident to the main action. The object or purpose of that action is to have plaintiffs' alleged right to exercise and enjoy the servitude claimed in perpetuity judicially recognized. If that judicial recognition be withheld, the injunction necessarily fails. The nature and scope of plaintiffs' action is no, limited by the verbiage of the prayer of the petition. All of the allegations must be considered, together with the prayer for general relief. 38 An. 912; 8 An. 268; 10 An. 719; 15 An. 426.

3. The contention of plaintiffs that this is a possessory action and that the question of possession is the only possible issue in the case is not well founded. The rule invoked is inapplicable to plaintiffs' pleadings. * * * "where a plaintiff himself puts at issue his right of possession, exhibiting his title in his petition, he does so at his own risk and peril." 39 An. 970; 4 Martin, 626; 34 An. 1054. "The issues in a possessory action may be twofold: (1) The fact of possession; (2) the nature of the possession." Concurring opinion of Fenner, Judge, in 34 An. 1054; see also 41 An. 1108; 40 An. 248.

4. On plaintiffs' motion to strike out the allegations of defendant's answer and his reconventional demand, all of defendant's allegations of fact must be taken as true. The motion is in the nature of an exception of no cause of action by plaintiffs to defendant's answer and reconventional demand. Therefore, for the purposes of the motion to strike out, it is true that plaintiffs suppressed in their pleadings the real nature of their title, that the contract exhibited by them is subject to an express resolutory condition, which condition has been accomplished by plaintiffs' flagrant violation of their obligation under the contract.

"The contract is entire, and by its very terms must stand or fall as a whole. Neither party has any advantage as to any rights acquired under it." 2 An. 478. In all cases the dissolution of a contract may be demanded by suit or by exception. C. C. 2047; 6 N. S. 224.

When a remedy may be sought by action, the party entitled thereto may avail himself of it by way of exception. C. P., Art 20; 14 An. 427; 12 Rob. 472.

5. The plaintiff having its domicile in a parish different from that in which the defendant resides, *a fortiori* has the right to set up his defences in this suit and enforce his demand therein for a dissolution of the contract, and for damages by way of reconvention, as he has done. C. P., Art. 375; Smith vs. Atlas Cordage Company, 41 An. 1.

Reconventional demand may be pleaded either as an exception in the answer or by distinct and separate suit before same court. C. P., Art. 377.

Article 375, as amended by Act No. 164 of 1839, provides that, under the circumstances above stated, the defendant may reconvene for any cause. The proviso in that article makes no distinction or discrimination whatever, and the courts ought not to recognize any. *Ita lex scripta est.*

The opinion of the court was delivered by

McEnery, J. On the 31st day of August, 1888, the plaintiff company purchased from the defendant a right of way over his property for the purpose of building a railroad. The consideration and price of said sale was the great personal advantage and benefit to the defendant and to the neighborhood by the construction of the railroad, and the sum of twenty-five dollars cash. The plaintiff built the railroad in accordance with the stipulations to the act of sale.

On the 13th August, 1888, the following argreement was entered into between plaintiff and defendant: That the said Hermitage Planting Company obligates itself to pay off all of its hands employed on the Hermitage plantation from and after the 15th day of September, 1888, and further binds and obligates itself to give all orders for goods and merchandise which the hands so employed may need on Frederick Higgason, of the parish of Ascension, store keeper at Darrow P. O., Ascension, La. And he the said Nolan, for and in the name of said planting company, binds himself and the said company to see that said Higgason is paid or secured for any advances which he may make to any of the hands employed on said Hermitage plantation (provided said advances be to a reasonable amount, and not to exceed the amount which said laborer or laborers, or hand or hands, may have earned, and which money be actually due him or them).

And now, in consideration of the said premises and above covenants and agreement on the part of said Hermitage Company, the said Higgason has this day signed before S. A. Gondran, notary public, in and for the parish of Ascension, a certain contract granting unto the said Hermitage Planting Company a certain right of way across his lands for the purpose of establishing by the said Hermitage Planting Company a railroad on his lands. Should the Hermitage Planting Company fail to comply with and fulfil any of the conditions and agreements herein contained and agreed to be carried out by them, then this right of way granted by the said Higgason this day, as per contract before said Gondran, shall be set aside or left at his option to do so.

It is further understood by the parties hereto that said Higgason is to give notice to the said Hermitage Planting Company before the pay day of the hands of said plantation of any amount which may be due him by any of said hands or laborers on said Hermitage plantation.

The defendant, believing that the plaintiff had violated the contract above recited, in May, 1893, went upon the right of way and tore up the rails of the railroad track crossing the length of the right of way granted to plaintiff. In September, 1893, the plaintiff brought this suit, setting out the act by which the right of way was granted in its petition, and alleging that it had continuously up to date, and said road ever had been in the quiet and undisturbed possession of the same; that plaintiff, in May, 1893, tore up the track on the road bed crossing right of way granted by defendant to plaintiff; that defendant with malice did obstruct plaintiff in replacing the track on the said land, and that defendant's acts were malicious, wrongful and tortious.

The prayer is that said defendant be enjoined from disturbing or placing any obstacles in the way of plaintiff from laying and replacing the track of their said road on and across said land, and from interfering with plaintiff in the use and enjoyment of their said railroad until the further orders of this court.

The injunction issued as prayed.

The plaintiff did not annex to his petition, and we do not think it was essential that he should have done so, the contemporaneous agreement made with defendant. The defendant answered, filing a general denial, and specially urges as a defence the supplemental agreement referred to, and that plaintiff had failed to comply with the stipulations contained in the same, and he prays that there be judgment annulling the act. He also filed a reconventional demand for damages.

It is admitted that plaintiff is incorporeal and actual possessor of the part of land running through defendant's line along the right of way, and all the acts of defendant in tearing up the track are also admitted.

The pleadings also show that the plaintiff denies having violated the contract.

The pleadings being in this condition, on the judicial admission, plaintiff filed a motion that they entitled him to a judgment. The motion was tried and the injunction perpetuated, reserving to both parties the right to sue for the amount of the contract. From this judgment the defendant appealed.

The contention of the defendant is that the contract is subject to a resolutory condition, and that he has the right to plead in avoidance

matters of defence showing a dissolution of the contract in order to reject the demand of plaintiff for a recognition of the right of servitude and its preservation thereof in perpetuity, and that the defendant being a non-resident of the parish he had the right to make any defence against plaintiff's action and to institute a demand against plaintiff by way of reconvention for any cause.

If this suit was based on the contract, and was intended to enforce the same, or for damages for its violation, the contention of the defendant would be well founded. 12 Rob. 472; 14 An. 627.

The averments in the petition and the prayer of the plaintiffs stamp plaintiff's action as possessory, pure and simple, and as such it must be governed by the law controlling possessory actions. There is no issue of title presented. It is contended by defendant that the exhibiting by plaintiff of his title to the right of way changed the character of the action and it became petitory.

The petition contains an allegation of ownership to show the nature and character of the possession, and the act of sale was exhibited, and annexed to plaintiff's petition as evidence of the fact and nature of possession, not of title, as the prayer of the petition is alone to be quieted in peaceable possession of the premises. It was not necessary to exhibit the act of sale, or to disclose by what title the company held possession of the right of way, but by doing so the plaintiff company did not impress upon the action the character of a petitory one. Kempers' Heirs vs. Hulic, 16 La. 46; Williams vs. Harmanson, 41 An. 705; Nicholl vs. Railroad Company, 44 An. 817.

As said by this court in 41 An. 705: "We are not concerned with the sufficiency or even with the existence of such title. The fact and nature of the possession alone is at issue," and we may add that we are not concerned with the fact whether or not the contract has been violated and by the resolutory condition the contract dissolved. This is a matter for future judicial determination under the reservations in the judgment appealed from if the parties see fit to resort to judicial process. It is certain the defendant had no right to take the law into his own hands and to disturb by violence the possession of the plaintiff. In such a case no inquiry is made as to whom the legal ownership of the property belongs, but the law is prompt in protecting the possessor, and to rebuke the unlawful act of disturbance by restoring the possession of the property to the party dispossessed. Nicholl vs. R. R. Co., 44 An. 817.

The defendant's remedy was before the law and through the courts, and no act of violence can supplement his resort to legal process to fix and ascertain his legal ownership of the property. Nicholl vs. R. R. Co., 44 An. 8 7; Boniel vs. Block, 44 An. 515; Fox vs. McKee, 31 An. 69; Trader vs. Ins. Co., 237; Laloix vs. Ins. Co., 27 An. 113.

The defendant contends that the primary object of the suit is to obtain a judicial recognition of the right of way and to perpetuate the same by injunction.

We do not so understand it.

The judgment was restricted to the allegations in plaintiff's petition, and the right of plaintiff to present possession was only recognized. The injunction is to prevent a disturbance of this possession. A judgment dissolving the contract would put an end to plaintiff's possession and the injunction would expire with it.

Judgment affirmed.

No. 10,619.

STATE OF LOUISIANA VS. MISS LAURA GAINES ET AL.

The State can not be sued before her own tribunals without her consent—the question is not affected by the fact that the claim is a demand in reconvention, set up in a suit brought by the State. State vs. Bradley, 37 An. 623.

The State should not be permitted to invoke judicial aid in wresting from the defendants evidences of a serious claim against her, until she has first, by proper legislative action, consented to submit to the courts the determination of all the rights and obligations incident thereto.

ON APPLICATION FOR REHEARING.

The decision of this court in State vs. Hart, 46 An. 55, must control.

APPEAL from the Civil District Court, Parish of Orleans. *King, J.*

Walter H. Rogers, Attorney General, for State, Appellee.

W. S. Finney and *Henry C. Miller*, Attorneys for New Orleans Canal and Banking Company, Defendant and Appellant.

The opinion of the court was delivered by

FENNER, J. The State, acting through her Attorney General,

brings this suit to recover from the defendant possessors fourteen State bonds, which, she alleges, were fraudulently and illegally embezzled and put in circulation by her late State Treasurer, E. A. Burke.

The bonds were held by Miss Laura Gaines, and were pledged by her to the Canal Bank, and they are both made defendants.

The State also claims from Miss Gaines a judgment for three thousand six hundred dollars, amount of interest coupons collected by her on said bonds.

The defendants answer, asserting their just title as *bona fide* holders of said bonds, which they assert to be valid and binding obligations of the State, and they pray for judgment rejecting the State's demand, and further decreeing that they be paid by the State in principal and interest, according to the terms of the contract.

From a judgment in favor of the State, the defendants appeal.

The issues involved are three, viz.:

1. The right of the State to oust the defendants of the possession of the instruments purporting to be bonds of the State, and to take the same into her own possession.

2. The right of the State to recover from Miss Gaines the amount of the interest coupons collected by her as having been unduly received.

3. The right of defendants to recover judgment against the State decreeing her liability for the principal and interest of said bonds to be paid according to the terms of her contract.

The third issue just mentioned is one which must be unhesitatingly decided against the defendants.

The State can not be sued before her own tribunals without her consent, and she has given no such consent. The question is not affected by the fact that the claim is a demand in reconvention set up in a suit brought by the State. State vs. Bradley, 37 An. 623.

So far as the other two issues are concerned the rights of the defendants as *bona fide* holders of said bonds, and the liability of the State to them as such, are urged as defences to the demands of the State, and if it were necessary for us to determine these questions in order to decide the issues between the parties, it might be our duty to do so.

But we are strongly impressed with the sense of our duty to abstain from considering or determining the liability of the State as a

debtor on these bonds, which the political authority of the State has not consented to submit to judicial arbitrament, unless such determination is absolutely essential in order to dispose of those issues which are validly submitted to us. Our decision thereon would be in no manner binding upon or executory against the State, and would simply operate an unwarranted intrusion of our opinion in matters which are confided to the free discretion of the political branch of the government.

We therefore felt bound carefully to examine the issues presented, in order to see if they admitted of determination on any grounds which did not involve the necessity of considering questions of such vital moment to both the State and the holders of these instruments.

We have concluded that these issues may be readily determined on grounds involving no such necessity.

So far as the right of the State to recover possession of the bonds is concerned, we must consider the nature of such instruments. They belong to the class of things known at common law as *choses in action*, or demands enforceable by action. With us they are merely evidences of debt, and belong to the class of incorporeal rights. They are not, at common law, subjects of larceny, though by statutes, in this and many other States, they have been made so. 1 Bish. Cr. L., Sec. 578.

They are no doubt subject to corporeal seizure under judicial process, and are treated in many aspects like corporeal property. They may become the subjects of action for specific recovery. But, nevertheless, their essential character and value consist in their quality as evidences of debt.

The Canal Bank is undoubtedly the lawful holder and possessor of these bonds, acquired by it in good faith and for a valuable consideration. They represent, on their face, an obligation of the State of Louisiana, signed by her Governor and Treasurer and under the seal of State, all attached in accordance with law.

They are the sole evidence which the bank has of the claim which she asserts against the State.

Where is the law or the equity which would authorize the State to invoke judicial process to wrest from the hands of her apparent creditor the sole evidence of his claim, without at least submitting

to the court for valid and binding determination all the rights and obligations arising thereon? We think there is none.

The demand of the State is entirely one-sided. If we decide in favor of the State, the judgment is executory, the defendants are ousted of possession of the sole evidence of their claim, and their mouths are forever closed. If we decide in favor of defendants, they acquire no new right under the judgment, but are simply left in *statu quo* and at the mercy of the State.

We think it too clear to require further argument that the State should not be permitted to invoke judicial aid in wresting from defendants their lawful possession of these evidences of a serious claim against her, until she has first, by proper legislative action, consented to submit to the courts the determination of all the rights and obligations incident thereto.

The claim for the return of the interest coupons alleged to have been unduly collected and received by Miss Gaines might have presented these questions in a different shape, requiring their determination—that is, a suit for money unduly received, in which we would be bound to determine whether it was unduly received or not, and which would necessarily involve the right of Miss Gaines to receive and the obligation of the State to pay.

But, as the case is presented, the evidence clearly establishes that the bonds were unlawfully put in circulation by E. A. Burke, and the only ground upon which any holder thereof could assert any rights thereon against the State would be that they were negotiable instruments, and that he acquired them before maturity in good faith and for a valuable consideration. After proof of their unlawful issue the burden was upon Miss Gaines to show that she acquired them in good faith. This burden she has entirely failed to discharge. We do not mean to asperse, in the slightest degree, the actual good faith of this lady. It was simply her misfortune, as this record shows, to be in a condition of health and nervous prostration which, in the opinion of her physician, rendered it improper and unsafe for her to be examined in this case, either at the trial or at any reasonably certain date in the future. Her counsel, therefore, submitted the case without her own or any other evidence, on the subject of the method and circumstances under which she acquired these bonds.

This is fatal to her defence, independently of any question as

to the rights of holders in good faith of these instruments, and we have no ground for reversing the judgment for two hundred dollars rendered against her in the court *a qua*.

In thus disposing of this appeal we wish it distinctly understood that we make not the slightest intimation of an opinion on the rights and obligations arising between holders in good faith of such bonds and the State. When a case comes before us requiring the expression of our judicial opinion on those delicate and difficult questions, we shall not shirk the responsibility, but our sense of official duty requires us to abstain from expressing such opinions unless absolutely necessary to the decision of a pending cause.

It is therefore ordered, adjudged and decreed that the judgment appealed from, in so far as it maintains the sequestration and condemns the defendants to return to the State the bonds involved, be annulled, avoided and reversed, and that the demand of the State, to that extent, be dismissed, and that the sequestration be dissolved; and that, in other respects, said judgment be affirmed.

DISSENTING OPINION.

BREAUX, J. The issues are presented.

The plaintiff and the defendant pray for a decision on the merits, settling the vexing and perplexing questions growing out of the embezzlement of certain bonds from the State Treasurer's office.

The effect of good faith, its scope, extent, the right of those who have become owners for valuable consideration without notice, can be decided at this time and the question forever settled.

If the holders of these fourteen State bonds own values for which the State is bound, they should be relieved from the claim on their property.

If they are valueless, delay serves no purpose.

The political branch of the government will be influenced by the decision as well at this time as at any time hereafter.

It is preferable to decide the issues at once and not to postpone questions that must be decided later.

These bonds should remain in *gremio legis* until the rights of the the parties in interest are finally determined.

I therefore dissent.

ON APPLICATION FOR REHEARING.

McENERY, J. The consideration of the application for a rehearing in this case, by consent of counsel, was deferred until after the decision of the case of State vs. Hart, recently decided and reported 46 An. 55.

The issues involved in the two cases are identical.

It will be unnecessary, and it would be fruitless of results to reopen the case for argument and postpone our decree.

We will refuse the rehearing, and will annul our former decree, and will now enter such a decree as should have been rendered in the first instance. Therefore, for the reasons assigned in case No. 10,899, State vs. Hart, it is ordered, adjudged and decreed that our former decree rendered herein be annulled, and it is now ordered, adjudged and decreed that the judgment appealed from be affirmed.

Rehearing refused.

Miller, J. recused.

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46 436
48 976

No. 11,383.

MRS. LOUISIANA E. FLOWERS VS. WILLIAM HUGHES ET AL.

The receipt by the appellant of a portion of the amount decreed to him by the judgment is acquiescence in the judgment and defeats the appeal. Code of Practice, Art. 567; 3 An. 115; 4 An. 150; 7 An. 233; 18 An. 64; 32 An. 947.

Nor is this acquiescence at all affected because the appellant, receiving part of the amount of the judgment, undertakes to reserve his appeal. The reservation can not avoid the effect the law attaches to the acquiescence in the judgment. 18 An. 64.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Rice & Montgomery and *J. P. Blair* of Counsel for the Motion:

The transcript does not contain all the evidence on the trial of the case below.

On examining the certificate the court will find these words qualifying the usual declaration as to the completeness of the transcript: "Record No. 34,962, being succession of John Hughes, offered in evidence by Mr. Blair, attorney for Mrs. Murdock *et als.*, defendants, having been only partially copied as per instructions of counsel for defendant and appellant, copied at page 420." On the page referred to will be found the following remarkable instructions: "Inasmuch as the record of the succession of John Hughes, No. 34,962, was offered in evidence by Mr. Blair, one of the counsel for defendants, was offered, but not filed, for the purpose of showing that the succession of John Hughes has been opened and administered, and the heirs put into possession, and the District Court ad-

mitted the record for the purpose, and inasmuch as the facts for which it is offered are not disputed, you should and shall not include in your transcript more than the several petitions and orders putting the heirs in possession.

"New Orleans, October 16, 1893.

"GEORGE L. BRIGHT,
"*Counsel for Wm. Hughes.*

"*To the Clerk of the Civil District Court.*"

The court, over objection, had admitted the entire record.

Appellant's counsel, not satisfied with reserving a bill of exceptions, has constituted himself a court of review, has set aside the ruling of the lower court, and has issued a decree in the form of instructions to the clerk, directing that only the portions of the record which he designates shall be considered in evidence and shall be embodied in the transcript.

When a transcript, made under instructions of counsel for appellant, is defective and incomplete, the penalty is dismissal of the appeal. Heirs of Hoover vs. York, 33 An. 652; Samuels vs. Brownlee, 38 An. 36; Morrison vs. Lynch, 36 An. 611; Torres vs. Falgoust, 35 An. 818.

It can not be controverted that under the laws and jurisprudence of this State the party who voluntarily executes, either partially or *in toto*, a judgment rendered for or against him, or who voluntarily acquiesces in or ratifies, either partially or *in toto*, the execution of that judgment, is not permitted to appeal from it. C. P. 567; Williams vs. Duer, 14 La. 523; State vs. Judge of Parish Court, 4 Rob. 85; Campbell vs. Orillion, 4 An. 115; Huhart vs. Golden, 7 An. 233; Landry vs. Connelly, 4 R. 127; Succession of Egana, 18 An. 72; Succession of Bougere, 28 An. 743.

When a plaintiff who had appealed from a judgment rendered in his favor, but for a less amount than he claimed, executing a bond with surety for the costs only, subsequently causes a *fi. fa.* to be issued against the defendant, it will be considered a voluntary execution of the judgment and an abandonment of the appeal. Campbell vs. Orillion, 3 An. 115.

The principle is well settled that a party is not permitted to do an act which he is at liberty to abstain from, and by mere reservation screen himself from the consequences of that act. Succession of Egana, 18 An. 64.

A. J. Villere and *Geo. L. Bright* of Counsel, *Contra:*

This is a suit for partition. The heirships are not disputed, but the appellant, William Hughes, one of the heirs, claims that the community that existed between his father, John Hughes, and his second wife, should be charged with certain moneys brought into marriage by his father. The parties were referred to a notary public. He made a partition, assuming that no charge should be made against the community, and he allotted to each of the heirs of John Hughes, including William Hughes, appellant, two thousand nine hundred and twenty dollars and seventy-four cents.

So far as two thousand nine hundred and twenty dollars and seventy-four cents are allotted to each, no one disputes the correctness of that amount except William Hughes, who contends that, besides two thousand nine hundred and twenty dollars and seventy-four cents, allotted to him, he should receive a larger amount, because of the indebtedness of the community to his father, John Hughes. The two thousand nine hundred and twenty dollars and seventy-four cents were not in dispute. Several of the heirs had purchased property at the sale, and retained the price on account of their share. William Hughes, the appellant, did not purchase. His share was in the registry of the

court. No one disputed his right to it. From a judgment which denied him the right to more than two thousand nine hundred and twenty dollars and seventy-four cents, he appealed, and upon a subsequent petition, which showed—

"That judgment was rendered in this cause homologating the partition made by N. B. Trist, notary public, on May 1, 1893, and on showing that said act of partition allots to your petitioner two thousand nine hundred and twenty dollars and seventy-four cents; that your petitioner opposed the partition and allotment made to him, claiming that the allotment to him should be largely increased, and all the other parties to the litigation maintain and assert the correctness of the partition and allotment as made by Trist, notary, as aforesaid; that your petitioner, William Hughes, does not complain of the allotment of two thousand nine hundred and twenty dollars and seventy-four cents, made to him, but contends that the amount should be largely increased, and as prayed for in his petition; that the judgment of this court homologated the act of partition made by said Trist, notary public, and decreed your petitioner was entitled to only two thousand nine hundred and twenty dollars and seventy-four cents; that from said judgment your petitioner has taken a suspensive appeal, returnable to the Supreme Court on the first Monday of November next. And on further showing, your petitioner needs moneys to pay costs of transcript of appeal and other necessary expenses, your petitioner prays that it will please this Honorable Court to make an order directing the Whitney National Bank, in this city, where the moneys to be partitioned have been deposited by order of court, and where the same is now deposited, directing and ordering said bank to pay out of said funds so deposited, to your petitioner or his attorney at law, the sum of five hundred dollars, without prejudice to the appeal taken by your petitioner, and without prejudice to the rule taken by him and now pending," the court ordered: "By reason of the foregoing petition, it is ordered that the Whitney National Bank, of this city, where the moneys to be partitioned have been deposited, and are now deposited, pay out of said moneys, so deposited, to the petitioner, William Hughes, or his attorney and counsellor at law, George L. Bright, the sum of five hundred dollars, without prejudice to the appeal taken by the petitioner, William Hughes, and without prejudice to the rule taken by him and now pending."

This is not an acquiescence. 3 R. 253; 3 An. 539.

The clerk of the court, in making the transcript, asked appellant for instructions as to what part of record 34,962 should be copied. This record was offered to show that the succession had been opened and administered and the heirs put in possession, and the court admitted it for that purpose.

Inasmuch as it is not denied that the heirs were put in possession, that the pleadings admit it, counsel for appellant instructed the clerk it was not necessary to copy a whole large record of irrelevant matters; that he should copy only that which referred to the object for which the record was offered, viz.: the putting in possession of the heirs. The clerk, after certifying that the transcript contains a true, correct and complete transcript of all the proceedings had, documents filed, testimony and evidence adduced on the trial of the cause, states, that Record No. 34,962, Succession of John Hughes, was partially copied by instructions of counsel for appellant. Even had he had no instructions, he should not have copied more than was copied. We repeat, the record, although offered, was not filed in evidence. It was offered to show the heirs were put in possession. The petitions and orders putting them in possession are copied. That they were put in possession is not denied, but admitted.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MILLER, J. The motion to dismiss is on two grounds: That the transcript is imperfect, and that the defendant in the lower court, the appellant here, has acquiesc d in the judgment from which he appeals.

The suit was for a partition between the plaintiff and defendant and others, heirs of John Hughes. The defendant in his answer urged that in the petition the last community should be charged with certain amounts of the separate estate of his father, received by or which enured to the benefit of that community, and the answer also contained other demands pertinent to the settlement of accounts between the heirs. The partition and sale of the property was decreed and the usual order of reference to the notary for the completion of the partition was made. The partition act awarded to the defendant twenty-nine hundred and twenty 74-100 dollars, and on motion of one of the parties the partition was homologated, against the objections of the defendant, whose demands urged in his answer were disallowed. From the judgment homologating the partition the defendant took this suspensive appeal. Pending his appeal, on his motion, he obtained an order to receive five hundred dollars of the amount awarded to him by the judgment, and accordingly that amount was paid to him. This payment is the acquiescence in the judgment, the basis of the motion to dismiss.

It is the text of the Code that the appellant can not maintain his appeal from the judgment acquiesced in by him. Code of Practice, Art. 567. To receive the amount of the judgment, in whole or in part, is, in its natural significance as well as under our jurisprudence, an acquiescence in the judgment. To receive part is as significant as to receive the whole. If the defendant could receive part of the amount decreed to him and still preserve his appeal, he might just as well take the full amount. If the judgment was satisfied by the defendant receiving the full amount, it certainly could not be urged he could still maintain the appeal from a judgment that, satisfied, had ceased to exist. Payment in part of the judgment as an acquiescence in that judgment is not to be distinguished from full payment. Any payment received by defendant under the judgment is fatal to his appeal from it. See 3 An. 115; 4 An. 150; 7 An. 233; 18 An. 64; 32 An. 947.

The defendant contends he can maintain his appeal, because he claims more than the judgment gives him, and his acquiescence is only to the extent of the amount decreed to him, but does not extend to the greater amount he claims and that the judgment disallows. But it is only through the judgment he can appeal to claim the greater amount, and if he acquiesce in that judgment the basis for his appeal disappears. It is often the experience that the plaintiff asserting a money demand recovers less than he claims. But, of course, no one supposes he could collect his judgment and still maintain his appeal, because he demands a greater amount than that decreed to him. Such a pretension was advanced in one of the cases cited in this opinion, where the appeal was devolutive. It was supposed in that case that the plaintiff, taking only the devolutive appeal, could collect his judgment and still prosecute his appeal for the greater amount he claimed. The court discarded this pretension, and held that acquiescence in the judgment by payment ended the appeal, though plaintiff claimed more than the judgment gave him. See 3 An. 115.

The defendant cites the case from 3 Rob. 253. There the judgment was in favor of the plaintiff for the partition of the land, and against him in favor of defendant for the improvements. The plaintiff took steps to execute the judgment in his favor for the partition, but appealed from the money judgment against him for improvements; that is, he took the appeal from the judgment to contest the money demand. The court held in that case, on the motion to dismiss, that acquiescence in the decree for the partition was not acquiescence in the decree against plaintiff for money. There was no act of plaintiff in that case of acquiescence in the money decree. The other case cited by defendant (3 An. 593) is that of an injunction against the seizure of property. The injunction was on motion dissolved as to part of the property, and that part plaintiff proceeded to seize and sell. By a subsequent judgment the injunction was maintained as to the residue of the property seized, and from that judgment plaintiff appealed. The court on a motion to dismiss held, that executing the judgment dissolving the injunction as to part of the property was not an acquiescence in the judgment maintaining the injunction as to the residue. There were two judgments. The court observed, the judgment in that case was not indivisible. There was manifestly in that case no acquiescence in the judgment appealed

from, because the appellant had executed another judgment. Here, there is one indivisible judgment in favor of the defendant for a sum of money. He takes part of the sum decreed to him. That must be deemed an acquiescence in it. The circumstance that in taking it, he undertakes to recover his right to the appeal is of no consequence. The protest itself evinces his appreciation of the significance of the act; the protest is unavailing to avoid the consequence the law attaches to acquiescence in the judgment.

It is a reluctant duty to dismiss appeals, thus precluding the relief sought by the litigant in the court of last resort. In this case the court conceives there is no alternative.

It is therefore ordered, adjudged and decreed that this appeal be dismissed at appellants' costs.

Rehearing refused.

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No. 11,470.

THE CYPRESS SHINGLE AND LUMBER COMPANY VS. P. LEONCE LORIO.

1. A person who has made advances of money and also of supplies in kind, in aid of the deadening of trees and the cutting and hauling of logs, can not claim a privilege for the whole advances on the logs and also a vendor's privilege on the special articles furnished. McRae vs. His Creditors, 16 An. 306.
2. The affidavit made for the purpose of obtaining a writ of sequestration is *prima facie* evidence of the facts authorizing the writ.

APPEAL from the Fourteenth District Court, Parish of Iberville. *Talbot, J.*

Alex. Hebert, Geo. Wailes, Geo. L. Bright and *A. H. Leonard* Attorneys for Plaintiffs and Appellants:

Appellant claims that the judgment rendered in the court *a qua* is erroneous in so far as it dissolves the sequestration. We are utterly at a loss to conceive the reason which induced the learned judge *a quo* to so decide.

There was no motion made to dissolve the sequestration, no suggestion in argument that it should be dissolved, and if there had been, such motion or suggestion could not have prevailed. There can be no doubt with regard to the advances made by the company to Lorio. He does not dispute them.

Act 38, session 1882, invests any person advancing money or furnishing supplies to enable another to deaden, cut, haul, float or raft any logs or forest timber, with a privilege upon such logs or timber.

The affidavit, order and bond for sequestration do not seem to be in any respect defective.

R. N. Sims and *G. A. Gondran* Attorneys for Defendant and Appellee:

A contract should be construed to give effect to every part of it. 8 An. 368; 7 An. 229; 8 An. 488; C. C. 1942, 80.

Plaintiff's mere demand for timber, without any offer to comply on his part, does not constitute default. C. C. 1912, 1913; 28 An. 107; 19 An. 84, 180, 178; 37 An. 835; 31 An. 165.

Plaintiff's original petition does not allege that defendant was ever put in default, and contains no prayer for a specific performance or for the rescission of the contract. The supplemental petition contains no allegation as to the putting in default, and sets forth no additional fact in support of the prayer therein for the annulment of the contract. Neither petition exhibits legal or sufficient ground to warrant the avoidance of said contract, by judgment, at plaintiff's instance, nor the recovery of the amount advanced under the contract, nor for alleged damages. As to all of these matters, plaintiff's petition and supplemental petition do not disclose any cause of action, and defendant's exception thereto ought to have been sustained. C. C. 1912-1918; 30 An. 1125; 37 An. 659-835; 5 La. 415; 14 La. 80; 11 La. 240; 7 La. 193; 18 La. 519; 3 An. 28; 9 Rob. 52; 2 An. 392. The allegations of the petition, as to plaintiff's obligations under the written contract, are controlled by the terms of said contract, which is annexed to plaintiff's petition as part thereof. Hennen 1148, No. 4.

The dismissal of plaintiff's petition on the exceptions of no cause of action would have left intact defendant's reconventional demand, his answer having been filed before the exceptions. Defendant, as appellee, having answered the appeal, is entitled to ask for the reversal of any part of the judgment of the lower court in which there may be error to his prejudice. C. P., Arts. 888, 890; Hennen, p. 70; 7 N. S. 657; 15 La. 352; 12 An. 241.

The contract involved, contemplated and stipulated the delivery by defendant to plaintiff of about five million feet of cypress lumber to be taken from the former's lands after being deadened, cut and hauled, together with other usual preliminaries and preparations incident and necessary to its proper manipulation, and further contemplated and stipulated expressly the obligation on the part of plaintiff to advance the defendant all the money required to fulfil his part of the contract.

Plaintiff utterly failed to carry out its agreement with the defendant, and its refusal to make further advances was under a mere groundless pretence. Plaintiff was formally put in default on the 9th of February, 1893, and defendant may lawfully claim damages for all losses suffered by him resulting from his enforced abandonment of the work. Sutherland on Damages, Vol. 1, pp. 127, 128, 130, 132; C. C. 1934; 44 An. 472.

Measure of damages. Defendant entitled to the profits he could have made under the contract. Full indemnity the true measure of damages, plaintiff having acted in bad faith. C. C., Art. 1934; Sutherland on Damages, pp. 17, 74 and 149; 44 An. 472; 26 Kan. 482, 10 N. Y. 489; 72 Ill. 161; 55 N. Y. 664; 13 Wis. 84; 73 Penn. 365.

The opinion of the court was delivered by

NICHOLLS, C. J. On 27th September, 1892, the plaintiff and de-

fendant entered into a contract which recites that "the defendant is the owner of a certain tract of land with cypress lumber thereon to the amount of five million feet, more or less, and of other tracts from which he also intends to get timber." The contract contains the following stipulations:

1. Lorio agrees to deaden, cut and haul, on the bank of Bayou Maringouin, there to be measured and docked, then to be rafted and delivered at the mouth of the bayou to the company, lengths of timber of not less than a specified measurement.

2. The company are to measure the timber at the end of each month as it lays on the bank of Bayou Maringouin, ready to be rolled into the bayou; the timber after being measured is to be rolled into the bayou, rafted and run down to the mouth of the bayou.

3. Lorio agrees to deliver the timber as aforesaid at the mouth of the bayou, all necessary expenses incurred in delivering the timber at the mouth to be paid by him.

4. The timber to be delivered at the mouth of the bayou for the sum of eight dollars per one thousand feet B. M. The shingle company obligating themselves to furnish to Lorio all money needed for current expenses in deadening and hauling, etc., and also to advance money on two timber wheels, also to advance feed for oxen.

5. As the timber is measured at the end of every thirty days, settlement is to be made at every time—one-third cash, one-third four months' note, one-third eight-months' note.

6. The money advanced on current expenses and for feed and timber wheels is to be deducted from the first cash payment on the timber. In the event that the cash payment is less than the money advanced, then the balance of the money due on expenses is to be deducted from the second cash payment on the timber, and if expenses still exceed the amount cash due, the money still due for advances will then be deducted from the third cash payment.

7. Lorio agrees to commence work at once as to deadening and other preparations necessary in manipulating the timber.

8. The company agree to let Lorio have five hundred dollars in the course of eight or ten days, to be deducted from the second or third cash payment, on which he is to pay interest at eight per cent.

In February, 1893, the plaintiffs brought the suit, in which they prayed for a judgment against the defendant for the sum of two

thousand two hundred and thirty-four dollars and twenty-three cents, with interest, with recognition of a privilege to secure payment of the same upon certain logs and other movable property of the defendant.

In the petition filed, after referring to this contract plaintiffs declared that it was understood and agreed that the money advanc d for current expenses, for feed and for the timber wheels was to extend no further than the third cash payment, claiming that under their construction of the contract the first cash payment was to have been on October 27, 1892, the second on the 27th of November, and the third the 27th of December. That the advances were not to extend further than the date of the third cash payment, as it was the true intent and understanding of the parties that Lorio could then by discount or otherwise realize on his notes and would be his own furnisher of supplies, and would then require but small advances if any at all.

Plaintiffs further averred that, believing defendant to be acting in good faith, they not only advanced him the money and mater als mentioned in the contract but made him advances both in money and materials far in excess of his obligations; that from the date of the contract to the 23d of February, 1893, they advanced him in money one thousand seven hundred and sixty-two dollars and twenty-three cents in cash, and four hundred and seventy-one dollars and fifty cents in materials.

That though defendant bound himself to haul with ox teams timber from his lands to the bank of the bayou, and to deliver same at the mouth of the bayou every thirty days, he had failed and refused to do so, in violation of his contract, nothwithstanding the most favorable and exceptionally fine weather.

That defendant had never exhibited to them an account of his current expenses; that although he had drawn money for the purpose of paying his labor, he had failed to do so, and owed largely on that item for the same; that in violation of his co tract and in fraud of plaintiffs' rights he had used the money advanced to under-cut timber, and to prepare to *float* the same during the coming spring in case of a sufficient flood so to do, when by the calls of the contract he was to *haul* the same; that to these and other purposes he had fraudulently diverted the advances made him to carry on his contract.

That defendant had hauled one hundred and sixty-five thousand

feet of timber which had been measured and rolled in the bayou, and that he had on the banks fifty thousand feet to be measured and rolled in said bayou. That it would cost about two hundred and fifty dollars to roll, raft and float all of said timber to the mouth of the bayou at the point of delivery.

That defendant insisted that the plaintiffs were bound under the contract to advance him money without limit, and declared that he would deliver timber when he was ready and when it suited his convenience. Plaintiffs claiming that they had a privilege on the timber then in and on the banks of the bayou, and on the movables advanced to Lorio, to the extent of two thousand two hundred and thirty-four dollars and twenty-three cents, and averring that they verily believed and feared that defendant would part with and dispose of said movables in his possession, and upon which they had a lien during the pendency of the suit, prayed for and obtained an order for the sequestration of the same. A claim for damages was set up by the plaintiffs, but no special reference to it is necessary, as it has been substantially abandoned in this court.

The sequestration ordered having been executed by seizure of a number of logs and other movables belonging to defendant, it was released on bond furnished by the latter.

Plaintiffs subsequently filed an amended petition, in which they prayed that the contract be set aside, annulled and avoided on account of the wrongful, tortious and illegal acts of defendant.

Defendant pleaded the general issue, but further answering admitted that he entered into the contract declared upon. He averred that soon after the same he went to work to carry out his part of the agreement; that he cut and hauled from his land to the banks of the bayou about two hundred thousand feet of timber, ready to be delivered at the mouth of the bayou as soon as the stage of water would permit of floating it; that in further compliance with his part of the agreement he caused to be deadened three thousand cypress trees on his lands for the purpose of having them cut and hauled to the bayou, to be delivered to the plaintiff as stipulated; that during the month of January and early part of February, 1893, in view of the fact that plaintiffs had ceased to make the necessary advances to enable him to carry out his contract, he made frequent demands on plaintiffs to make said advances and to furnish him with the funds required for the prosecution of the work; that the officers of the

company, when they entered into the contract, knew that the disbursement of large sums of money would be required to deaden, cut and haul so vast a quantity of timber to the banks of the bayou, notwithstanding which the company ceased to make advances for that purpose, and persisted in their refusal to do so, ignoring and disregarding his demands; that on the 9th of February, 1893, he caused to be served a written notice and demand to the end of formally putting the company in default for non-compliance with and acting in violation of their obligations under the contract; that he had been at all times ready and willing to comply with all of his obligations under the contract, and that he had been prevented from continuing the prosecution of work solely by the wrongful neglect and failure of plaintiffs to perform thei obligations; that the active and wrongful violation of the contract had caused, and will cause, him great damage and injury; that the deadened trees on defendant's land, so deadened on the faith of plaintiffs' obligations, are subject to deterioration and decay, and ultimate loss; that by plaintiffs' failure to comply with their obligations and repudiation of their contract he will be deprived of the profits which would have accrued to him under the contract; that said profits embracing the delivery of five million feet of timber to defendant would amount to two dollars per thousand feet and to ten thousand dollars for the quantity of timber covered by said contract, which sum he is entitled to recover; that the deterioration and decay of the three thousand deadened trees would involve a loss to him of four thousand dollars, which amount he is also entitled to recover. Defendant prayed that plaintiffs' demand be rejected, and assuming the position of plaintiff in reconvention he prayed that plaintiffs be adjudged to have wrongfully and actively violated their contract, and by their wrongful acts to have annulled the same, and that he have judgment for the sum of ten thousand dollars as damages for the loss of profits which would have accrued to him under said contract, and for the further sum of four thousand dollars as damages for the loss occasioned and involved in the deterioration and decay of the deadened trees.

The District Court rendered judgment in favor of the plaintiffs, against the defendant, for the sum of two thousand two hundred and thirty-four dollars and interest, with privilege to secure the sum of seventeen hundred and thirty-four dollars and interest thereon, as being for moneys and materials furnished by the plaintiffs on one

hundred and sixty-five thousand feet of cypress logs in Bayou Maringouin, and fifty thousand feet of cypress logs on the banks of said bayou, on two pair of timber wheels, three oxen, two hundred and ninety-seven chain-dogs. The judgment annulled, avoided and set aside the contract, and set aside and dissolved and avoided the sequestration decreeing that all the costs incurred by virtue of the writ of sequestration and the seizure thereunder be paid by the plaintiffs. It further dismissed the claim of both parties for damages, reserving to defendant his right of action for any damages caused by the wrongful issuing of the writs and the seizure.

The plaintiffs appealed. Defendant in answer to the appeal prayed that plaintiffs' entire demand be rejected, that the contract referred to in the pleadings be avoided and set aside on his (defendant's) demand, and not on that of plaintiffs'; that he have judgment for damages as prayed for in reconvention, and that the costs of both courts be cast upon the plaintiffs.

Both sides having asked the setting aside of the contract, the judge's action in so doing was correct. The only question touching this action is as to the party at whose instance the avoidance must be properly held to have been made. Defendant contends, as we have just said, that the contract should have been set aside on his prayer.

The avoidance of the contract finds the parties in this situation: Defendant has received from the plaintiffs a quantity of movables which he still holds and owns. He has received from them over two thousand dollars. By common consent and understanding, five hundred dollars of this sum were applied by defendant to his household expenses; the balance was expended by him deadening, cutting and hauling timber on his land to the banks of the bayou. The number of trees deadened, cut and hauled and now in his possession is represented by over two hundred thousand feet of timber in the bayou on his land and on the bayou bank—the number of deadened trees still standing on his land is about three thousand. This is the defendant's position. Plaintiffs, on the other hand, have up to date paid out the money and furnished the supplies mentioned, and not only have not received anything by way of return, but are confronted with a large claim for damages.

We have examined the record with great care to see whether this unequal condition of affairs was brought about by the conduct of

the plaintiffs themselves. It will serve no good purpose to enter minutely into the testimony. It suffices to say that, in our opinion, defendant's complaints are not only without merit, but, on the contrary, his cause has been unjustifiable and his demands unreasonable. There is nothing in the contract to warrant defendant in the pretension that plaintiffs were to continue to furnish him with money and supplies, either until he should have deadened enough trees on his land to furnish five million feet of timber, or until he should have done this and should besides have cut and hauled the same to the bayou. With over two hundred thousand feet of timber on the banks of the bayou, ready for measurement and shipment (the product of the advances made by the plaintiffs), defendant was not warranted in attempting to hold on to the same on the ground that plaintiffs had ceased to make advances under the contract. The contract is indefinite, both as to the quantity of timber which defendant was to furnish and the money and supplies plaintiffs were to advance, but it was clearly in contemplation of the parties that the furnishing of the latter and the delivery of the timber were to go on, if not simultaneously, at least with reasonable relations, one to the other. Whilst it might have suited the defendant to continue indefinitely to deaden trees without delivering timber, this certainly would not have suited the plaintiffs, whose outlays were made with reference to prompt returns. We think plaintiffs did all that they could have been expected to have done in the way of advances. The personal judgment in their favor, and that rejecting defendant's claim for damages under the contract, must stand.

Plaintiffs' object in taking the appeal was to obtain a reversal of that portion of the judgment dissolving the sequestration and reserving to defendant a right of action for any damages caused by the wrongful issuance of the writ of sequestration and to obtain a judgment in this court sustaining and maintaining the sequestration.

We concur with the District Court in its conclusions that plaintiffs' claim is to extent of one thousand seven hundred and thirty-four dollars and twenty-three cents, secured by privilege upon the logs, but we do not think the privilege covers strikes and the timber wheels, the oxen or the chain dogs. These articles are themselves part of the supplies for the furnishing of which we have recognized privilege on the logs. See McRae vs. His Creditors, 16 An. 306.

The district judge does not state upon what ground he dissolved

the sequestration. There was no motion made to dissolve it. The affidavit seems to be in due form and the allegations of the petition appear sufficient to justify the writ. Johnson vs. Johnson, 13 An. 581.

Defendant does not present to this court any reasons going to show error in the order for the sequestration, and we think it should have been maintained as to the logs, though not as to the other movables, which as we have stated were not struck by privilege.

For the reasons herein assigned it is ordered, adjudged and decreed that the judgment appealed from be reversed and set aside in so far as it dissolved the sequestration issued in this case and reserved to defendant a right of action for any damages caused by the wrongful issuance of the writ of sequestration.

It is further ordered, adjudged and decreed that the judgment be amended in so far as it recognizes a privilege upon the timber wheels, the oxen and the chain dogs; the privilege claimed on the said movables being hereby denied.

It is further ordered, adjudged and decreed that the writ of sequestration which issued herein be and the same is sustained and maintained upon the property sequestered except as to the timber wheels, the oxen and the chain dogs, and the said sequestration is reinstated.

It is further ordered, adjudged and decreed that the judgment, except as to the particulars herein above amended and reversed, be and the same is hereby affirmed.

No. 11,454.

Mayor and Council of Alexandria vs. H. H. White.

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Municipal corporations are restricted by their charters with respect to the taxes the corporation may impose on property or occupations. See Burroughs on Taxation, Chap. 19, p. 381; 29 An. 261.

The Legislature may, by general act *i. e.* applicable to all such corporations, enlarge their taxing power—that is, without amending their charters, this enlargement of this taxing power may be effected by general legislation. 1 Dillon, Chap. 5, p. 169; Revenue Act 1890, No. 150, Sec. 14.

On Application for Rehearing.

Legislative provisions conferring the taxing power on cities, towns and parishes are within the scope of the title of the act "To levy, collect and enforce payment of an annual license tax upon persons, associations or business firms and corporations pursuing any trade, profession," etc. Act No. 150 of 1890; Const. La., Art. 29; Municipality vs. Michaud, 6 An. 606; Succession of Lambeth, 9 An. of 338.

Mayor and Council vs. White.

APPEAL from the Justice's Court, Alexandria Ward, Parish of Rapides. *Rachal, J.*

John C. Ryan Attorney for Plaintiffs and Appellees:

This suit was brought to recover from defendant, an attorney, five ($5) dollars amount of his license for practising law in the limits of the town of Alexandria, during the year 1893. He contends that the town has no right, under its charter, to collect the license, and that the license is illegal and unconstitutional. The magistrate gave judgment in favor of the town, and defendant prosecutes this appeal.

Plaintiffs contend the power is given and conferred by the License Act of 1890, No. 150, by Sec. 14, p. 207, which reads: "Be it further enacted, etc., that any municipal or parochial corporation in the State shall have the right to impose a fair and equitable license tax on any business, occupation or profession herein provided for; provided, that all such license tax shall be graded."

The Legislature had the power to amend the charter of the municipalities in this way. Dillon on Municipal Corporations, 4th Ed., pp. 140, 385, reads: "The powers conferred upon municipal corporations may at any time be altered or repealed by the Legislatures, either by a general law operating upon the whole State, or in absence of constitutional restriction by a special act."

H. H. White and *J. F. Ariail* Attorneys for Defendant and Appellant:

A statute will not repeal a prior statute merely because it repeals some and admits others, or adds new provisions. 124 U. S. 406.

The provisions of a special act, or special authority derived from the Legislature are not affected by general legislation on the subject. 17 Wall. 425; 100 U. S. 585; Cooley Const. Lim., p. 337; 1 An. 49.

The general rule that a latter statute which is general does not repeal a former one which is particular, and that where there is a difference in the whole purview of two statutes apparently relating to the same matter the former statute remains in force, is applied to the charters of municipal corporations. The law does not favor repeals by implication. American and English Encyclopedia of Law, Vol. 15, p. 974.

The charters or acts of incorporation of municipal corporations within the State are the measure as well as the source of their powers. Mayor vs. Roth, 29 An. 261.

The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations. It is presumed the Legislature has granted in plain terms all it has intended to grant at all. If it is not manifest that there has been a purpose by the Legislature to give authority for collecting a revenue by taxes on specified occupations any exaction for that purpose will be illegal. Cooley Const. Lim., p. 387; Act No. 111, 1868, Sec. 12; Act. No. 150, 1890, Sec. 14; Act No. 138, 1880; New Iberia vs. Migues, 32 An. 923; Act 107, 1868.

The opinion of the court was delivered by

MILLER, J. There is an appeal under Art. 81 of the Constitution from the judgment of the justice's court of the Alexandria ward, parish of Rapides, in favor of the town of Alexandria, against the defendant for the amount of the license tax as an attorney at law.

The defence is, there is no authority to exact the tax.

The charter of the town, granted in 1868, conferred no power to impose taxes on occupations. Deriving their existence from their charter, municipal corporations can exert the taxing power only to the extent authorized by the Legislature. Dillon on Municipal Corporations, Vol. 2, Secs. 740, 763; Mayor vs. Roth, 29 An. 261; Board of Trustees vs. Migues, 32 An. 923. The Legislature, however, in the revenue acts of 1886 and 1890, has manifested its appreciation that all parochial and municipal corporations should possess the power to impose license taxes. These acts declare that all municipal or parochial corporations shall have the right to impose a fair and equitable license tax on any business, occupation, or profession herein provided for; provided, that license shall be graded. See Act No. 101 of 1886, Sec. 13; Act No. 150 of 1890, Sec. 14. These acts provide for license taxes on attorneys. In pursuance of this authority, the plaintiff, by ordinance, imposed such licenses and under that ordinance the defendant is sued.

In our opinion it was competent for the Legislature by a general statute to enlarge the taxing powers of parochial and municipal corporations. 1 Dillon Municipal Corporations. If in the legislative wisdom such increase of the corporate powers was beneficial, it is not easy to appreciate any objection to a general law, *i. e.*, applicable to all municipal or parochial corporations, declaratory of the legislative purpose. The defendant contends, on the contrary, that the charter of Alexandria should have been amended under the Act No. 110 of 1880, providing for amendments to charters of towns or cities, and it is urged, it was only by such amendment, the power to tax occupations could have been conferred on plaintiff. While under the act of 1880 the town might have obtained the necessary amendment conferring the power to exact licenses, still the competency of the Legislature by general act to deal with the subject is, in our view, undoubted. Again, the defendant urges that the charter of Alexandria being special legislation is not to be deemed affected by provisions applicable to towns generally, contained in the Revenue

Acts of 1886 and 1890. But the express purpose of the provisions of the revenue acts under consideration was to supplement with the right to tax occupations the powers of all parochial and municipal corporations not clothed with that right by their charters. The charter of Alexandria not conferring any taxing power in respect to occupations was clearly within the scope of the provisions in the revenue acts.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed at the costs of the appellant.

ON APPLICATION FOR REHEARING.

The defendant in his application for a rehearing in this case directs our attention to his defence that the power to tax occupations or professions conferred on municipal and parochial corporations by the acts of the Legislature of 1886 and 1890 is not embraced in the titles of the acts. We had not overlooked the point, but did not appreciate it was pressed. The titles are to levy, enforce and collect a license tax, etc. The act was intended to embrace the State and the political corporations—cities, towns and parishes, each exerting within its sphere the taxing power. In the body of the act the power is conferred on parochial and municipal corporations to levy license taxes. We think these provisions are fairly within the scope of the title to be construed as expressed by the court according to the understanding of reasonable men. Const., Art. 29; 6 An. 605; 9 An. 239; Act No. 161 of 1886, Sec. 13; Act No. 150 of 1890, Sec. 14.

It is therefore ordered that the application for the rehearing be refused.

No. 11,237.

ARTHUR H. MURRAY ET AL. VS. SUCCESSION OF JOHN SPENCER ET AL.

1. An exception of prematurity is not waived nor merged in the answer by a consent to have the same referred to be tried with the merits, particularly where the answer filed is under reservation of the exception.
2. Robert H. Short died leaving two wills, both of which were probated. By the first or Christy will plaintiffs, as his heirs-at-law, were entirely cut off. By the second or Zengel will they were also cut off save for a small special legacy. In proceedings in the Civil District Court these parties prayed that both wills be set aside—that Short be decreed to have died intestate, and that they be recognized as his legal heirs, assigning as grounds that the notaries who drew up

the wills had not complied with legal forms and requirements. On trial the Zengel will was set aside, but the Christy will was upheld. They then instituted suit against the notary who had drawn up the Zengel will for damages, claiming that through his negligence and want of care he had caused that will to be a nullity, carrying with it as a result the loss of their legacy.

Held: That having adopted the errors of the notary and sought to utilize the same for their benefit to get into position as heirs they should not be permitted, because unsuccessful in their ultimate object, to turn back upon the notary for damages.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

F. Rivers Richardson and *Frank E. Rainold* Attorneys for Plaintiffs and Appellants:

A judgment is not a consent judgment because the case is submitted to the court for adjudication without argument. A judgment is rendered upon the issues as they appear from the pleadings and upon the pleadings alone.

A judgment must be considered valid and binding until reversed or set aside in a proper proceeding; no collateral attack is permissible. Kent vs. Brown et al., 38 An. 802; 36 An. 533, 831; Succession of Keller, 39 An. 579; 32 An. 896.

An appeal lies from any judgment for the term of one year from date of final judgment (Code of Practice, Art. 593), and those not parties to a judgment when their interests are affected may appeal. Code of Practice, Art. 571.

A will to be valid, in the nuncupative form, by public act, must be entirely dictated by the testator, written by the notary as dictated and in the language of the testator, read over to him in presence of the attesting witnesses and express mention must be made of the performance of these formalities. Civil Code, Arts. 1578, 1579 and 1580.

It is not sufficient that a part of the will is clothed with these formalities. It must be done in regard to the whole; hence if upon the reading of the will over to the testator he changes any portion of it, such change must be written in the language of the testator; it must state that this change was dictated by the testator to the notary and written by him as dictated, all in presence of the witnesses, and that the same was read over to him. Without the observance of these formalities, the will is a nullity. Grenier,

No. 239; Merlin Rep., V. "Testament," Sec. 2 e. par. 3, Art. I, No. 13; Toullier, Droit Civil Francais, Vol. 5, p. 416, par. 452.

A notary who executes a defective will is responsible to those whom he has damaged, and the measure of damage is the amount of the lost legacy. Rochereau vs. Jones, 29 An. 82; Wintz vs. Kramer, 44 An. 35.

The bond given by the notary is that he shall well and truly perform his duties as such. It is a guarantee of his competency to fulfil such notarial duties. Bingham vs. Bussey, 26 An. 676; Fox vs. Thebaut, 33 An. 33; Wintz vs. Kramer, 44 An. 35.

The duty of the notary is to follow the plain letter of the code, and if he does so he is certain to make no error. When he disregards these requirements and decides upon reflection that they can be omitted as to a particular portion of the will, he does so at his own risk, and it is not an error of judgment by which he can escape liabilty, but it is on the contrary culpable carelessness. Wintz vs. Kramer, 44 An. 35.

The amount of the estate having been proved by the inventory and oral evidence to be largely in excess of the debts of the estate, the presumption is raised that the plaintiffs would recover their entire legacy, and this presumption not having been rebutted, the matter stands as proved.

The liability of the notary and his bondsmen for damages on account of the loss of the legacy arose as soon as a judgment was rendered annulling the will made by him; the plaintiffs are not compelled to wait the final winding up of the estate if other evidence can show the amount of the damage. Wintz vs. Kramer, 44 An. 35.

A legacy of a sum of money is a a legacy of personality and is hence governed by the *lex domicilii* and not the *lex rei sitæ*. Succession of Malone, 2 R. 382.

All parties to a suit are bound by the decree even if other proceedings are instituted in other States. Am. and Eng. Ency. of Law, Vol. 12, p. 149 c. and authorities, and Vol. 13, p. 15 and notes.

The primary probate at the domicile of the deceased makes probates in other States ancillary to this primary probate, and after administration the funds of the ancillary administration must be turned over to the primary administration. Am. and Eng. Ency. of Law, Vol. 3, pp. 640, 651.

The exception of prematurity is abandoned when referred to the merits by consent of defendants.

An action of this character arises as soon as the title to the legacy is discovered to be null and void.

The prematurity *vel non* of this action is not dependent upon whether succession of Short has been or ever will be administered.

Henry P. Dart Attorney for Defendants and Appellants:

Under the French law amendments and alterations to a testament are governed by a special statute, describing the duties of notaries in the minutest detail, and the Civil Code does not contain any provisions relative to such matters.

When it appears from the will that it was read to the testator in the presence and hearing of the witnesses, it matters not what way this fact is expressed or in what portion of the testament this declaration is contained.

A notary should only be held in damages for defects of form in case of fraud or grave fault, or such gross negligence that might be attributed to bad faith, or when he acts in violation of a plain textual provision of the law.

The notary is evidently excusable and should be discharged of all responsibility when the question is on a point of law on which there is difference of opinion and of jurisprudence, and unless the circumstances are gravely against the notary his cause should be favored.

The punishment should be in proportion to the wrong, and it would be out of proportion if a simple inadvertence would result in a condemnation that would ruin the notary.

If a notary is held in damages in every case, the slightest error or merest inadvertence would be punished as severely as the gravest fault.

A notary should never be held in damages for an error of judgment when he has been called upon to act on a doubtful point of law.

No one should be permitted to profit by his own wrong, and where he has consented to or contributed to the act which occasions the loss, he should not be permitted to maintain an action in damages.

This rule is especially applicable when the party acts after mature deliberation and perfect freedom in exercising his will.

If a party prays for a judgment he should not be permitted to claim damages for a resulting loss which he has sustained from the judgment rendered in accordance with the prayer of his petition

If a person voluntarily consents to an injury he ought to be made to bear the loss.

Where a decedent leaves property in several States, and his will is annulled in Louisiana, and the will is good in the other States, the legatees should not be permitted to hold the notary for damages until they have exhausted every means to have their legacies satisfied out of the property located in the other States.

The property of a decedent in every State forms a separate succession, and can be administered in the different States irrespective o the domicile of the testator.

A notary can not be held in damages for an alleged loss of legacy until the estate of the decedent is settled and the amount of the damage is definite and final, and particularly should this rule apply when the property of the testator in the other States has not even been sold.

In the absence of such definite evidence fixing the actual amount of loss, an exception of prematurity should be maintained.

**Henry C. Miller*, as *Amicus Curiæ*, submits a brief:

Robert H. Short, deceased, left a last will dated April 19, 1888, and a paper purporting to be a will of date December 29, 1888.

It was claimed that the testator was *non compos mentis* when the April will was made and that the December paper was void as a testament, because, being nuncupative in form by public act, the certificate of the notary was defective.

The court sustained the April will and set aside the December will on the ground of the defective certificate. The executor thereupon qualified and proceeded with the administration, selling a portion of the property and discharging to a great extent the debts of the succession.

The present plaintiffs, named as legatees under the December will, bring this suit against the notary and his sureties, claiming damages by reason of the judgment setting aside said will on account of the defective certificate. The same judge who rendered the

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*NOTE.—This brief was filed in court before Mr. Miller was appointed Associate Justice.—REPORTER.

judgment maintaining the April will determined this cause in favor of the notary and his sureties, and holding the certificate to the December paper sufficient, and that it was valid as a will.

The executor is embarrassed by this last opinion of the lower court. If the December paper is good as a will, the April will first sustained by the lower court is superseded because of earlier date. If this last opinion is to prevail, then the action of the executor under the April will is apt to give rise to complications. Both in regard to his past and future course, the executor has an interest in the question arising on this appeal of the validity of this paper of December. He asks to be allowed to submit this brief. He has no concern in the issue between the plaintiffs and the notary. This brief is not filed to support any case the plaintiffs may be deemed to exhibit against the notary; but it is submitted to show that the paper of December, asserted to be the will, was of no effect because the last dispositions which the eccentric testator added at the moment of signing, changing radically his previous dispositions, are not embraced in the certificate of the notary. Indeed, as the paper itself shows, the closing dispositions were never dictated or written by the notary, or read to the testator in the presence of the witnesses. The executor desires the cloud cast on his administration by this last opinion, holding valid this December paper, removed.

The certificate of the notary to the nuncupative will received of him must show that every disposition of the testator was dictated by him, written by the notary as dictated and read to the testator; that this dictation, writing and reading were in the presence of the witnesses, and of all these requisites the certificate must make express mention, no proof being admissible to supply any omission of the certificate. Civil Code, Arts. 1578, 1647; 5 Toullier, p. 416, pars. 432, 433; 3 Troplong, p. 111, par. 1561; 1 Dalloz (les Codes annotes), p. 802, Nos. 306, 307; 1 Robinson, p. 48; 12 Robinson, p. 29; 16 Louisiana, p. 80; 12 Robinson, p. 35.

It follows that the certificate is defective, when it does not extend to each and every disposition of the will, as for instance in this case when after the dictation, writing and reading of the dispositions, and after the mention of these formalities, the testator adds other dispositions at the moment of signing, not certified to have been dictated or written or read. *Ibid.*, specially 5 Toullier, p. 417, par. 432.

The nuncupative will by public act is in law the entire testamentary paper as it is written by the notary. It can not be good as to part and void as to the remainder. If the certificate fails to show that all the dispositions in the paper were dictated by the testator, written by the notary as dictated, and then read, all in the presence of the witnesses, the nullity is not only of the dispositions not certified as required by the code, but all the dispositions are annulled, and there is no will. 5 Toullier, p. 417, par. 432; 8 Troplong, p. 111, par. 1562; 1 Dalloz (les Codes annotes), p. 802, No. 313; Sirey (les Codes annotes), p. 241, No. 50.

Charles S. Rice, Amicus Curiæ, presented an oral statement.

F. Rivers Richardson and *Frank E. Rainold* for Appellants, in reply and on application for a rehearing:

The evidence shows that there should be judgment for plaintiff for two thousand five hundred and twenty-five dollars and sixty-one cents, and in no event less than two thousand three hundred and sixty-eight dollars and five cents.

The act which occasioned the injury was the faulty confection of a will by defendant notary. It was impossible for plaintiffs to have been guilty of contributory negligence, nor does the maxim "*Volenti non fit injuria*" apply to them.

As far as the rights of plaintiffs are concerned the will is governed by the laws of Louisiana; the legacy of a sum of money being a "personal" or "movable" right.

The courts having jurisdictions of the auxiliary succession proceedings applied the law of Louisiana and annulled the Zengel will for want of form. They did not err in following the judgment of the court of the domiciliary succession.

Estoppel, like prescription, to avail a defendant, must be specially pleaded. The plea can not be supplied by the court. 33 An. 748.

Where no injury to the rights of defendant have resulted from the actions or declarations of plaintiff, there can be no estoppel. The vitality of the plea depends upon injury.

To constitute estoppel by record the allegations must be contradictory and the litigants the same.

To constitute equitable estoppel the party pleading it must have been injured.

The judgment of the lower court being one absolutely in favor of defendants, and this being the judgment brought before this court for review, the court in amending the judgment in favor of the minor plaintiffs so far as to non-suit them must determine whether or not they have a cause of action. To do this, the validity of the will must be setted. If it is void, the minors have no cause of action, and the judgment of the lower court should not be amended. It is error not to have passed upon this question.

It is error not to have determined how the costs of appeal should be apportioned, the judgment of the lower court having been reversed in part.

The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiffs represent that Fred. Zengel is a notary public in and for the parish of Orleans, and was such on the 29th of December, 1888, at which time he received the last will and testament of Robert H. Short, who formerly resided in New Orleans and died on the 11th of August, 1890, in which said will the said deceased gave and bequeathed to Mrs. Virginia T. Murray, widow of Joel T. Murray, or her heirs in case he survived her, the sum of three thousand dollars.

That on the 22d of May, 1890, and before the death of Robert H. Short, Mrs. Virginia T. Murray died, leaving as her heirs Arthur H. Murray, Mrs. Juliette Murray Jones, and the issue of a predeceased daughter, Mrs. Mary W. Murray, to-wit: the minors Arthur Murray Dargan, Cornelia Alice Dargan and Bertie Lucy McDonald, all of whom are plaintiffs herein, and are the parties described as the heirs of Mrs. Virginia T. Murray in the said testament, and would be hence entitled to the said legacy.

That the said will was duly probated on the petition of Philip S. Sims, named as one of the testamentary executors in the will, on the 18th of August, 1890. That thereafter Mrs. Margaret Short Moran, a legatee of R. H. Short, filed a suit to annul the will, on the ground that the said notary had failed to clothe the will with the formalities required by law, and especially because after a greater portion of the said will had been dictated by the testator to

the notary, and having been read over to the testator and the testator having changed certain dispositions and added a modification or an amendment to the will, bequeathing the residue of his estate after discharging the legacies therein named to all the legatees named therein, share and share alike, the notary failed to clothe said amendment or modification with any of the requirements of law, and by reason of the said fatal defects the said will was a nullity. That plaintiffs were cited, among others, as defendants in said suit, and after due proceedings said will was annulled and avoided solely by reason of the fatal defects of form appearing on the face thereof, due wholly to the fault and want of care on the part of the notary, which judgment is now final. That when the notary executed the said will, William R. Richardson and John Spencer, now deceased, were the sureties of the said notary on his notarial bond, on which bond the said Fred. Zengel, notary, bound himself as principal in the sum of five thousand dollars, and each of the sureties in the sum of twenty-five hundred dollars.

That by reason of the fault, negligence, imprudence, want of skill and inattention to his business, and the deplorable omissions in failing to clothe the will with the requirements of law, which the said Robert H. Short had a right to expect by reason of the said Zengel's reputation as a competent notary, the will was a nullity, and was so declared by judgment of court, and petitioners were damaged in the full sum of their so lost legacy.

That John Spencer, one of the sureties, has died, and his succession is represented by the said Fred. Zengel and John Lynch as executors.

That under the law the said notary is liable for said damage and injury; that the surviving surety, Richardson, is liable *in solido* with him up to the sum of twenty-five hundred dollars, and that the succession of Spencer is liable *in solido* up to the sum of twenty-five hundred dollars.

They pray for judgment against Zengel for three thousand dollars and for judgment for the sum of twenty-five hundred dollars against Richardson, and for a like amount against the succession of Spencer, with legal interest from date of judgment.

Defendants excepted—first, that the demand was premature, and, second, that the same sets forth no cause of action.

Plaintiffs then filed a supplemental petition, in which, reiterating

their averments as first made, they further alleged that the succession of Short is perfectly solvent, and had the will of the deceased executed before the said notary not been annulled by decree of court, they would have received the full amount as stipulated in the said will th t they shoul d be entitled to—that even had the court failed to annul the will for the reason more particularly set forth in the petition, still the said will was an absolute nullity because the notary had failed to clothe it with the formalities required by law, in that it was not written by the notary as dictated by the testator, which said fact the notary has himself testified to in the contest of said wills of the deceased, in which he was examined as a witness, all of which was due wholly to the fact of the negligence and want of skill of the said notary, as was more fully set forth in the or ginal petition.

By consent of counsel the exceptions were referred to be tried with the merits.

Defendants, under reservation of their exceptions, answered, pleading first the general issue; further answering the defendant, Zengel, said that it is true he made the will complained of, but that he took down and wrote the will exactly as it was dictated by the testator, and that he did not fail or omit to comply with all the formalities of law, and he specially denied that the will in question was invalid, or that the same has ever been held to be invalid by any court or in any case, except in a consent proceeding, and he specially denied that the plaintiffs have suffered any loss whatever as the result of the making of the will, and that in the event that the e should be an error in the confection of said will, then he pleaded the same was an error of judgment, and not want of skill, or negligence in the confection of the will.

Judgment was rendered in the District Cour. in favor of the defendants, and plaintiffs have appealed.

Robert H. Short died in the city of New Orleans on the 11th August, leaving no ascendants or descendants, but certain collateral relations who, in the absence of the testamentary dispositions by him, would have been his legal heirs.

These parties were (1) the plaintiffs, who are the children of *Virginia Thomas Short*, a predeceased sister, who was the *widow of Joel Murray;* (2) a half sister, Juliette Brown, widow of R. S. Simms; (3) the descendants of William H. Brown, a predeceased half-brother; (4) the representatives of Richard Brown, a predeceased

half-brother; (5) the representatives of John Short, a predeceased half-brother.

Robert H. Short had, however, executed two wills by notarial acts—one before Geo. W. Christy, notary, on the 19th day of April, 1888; the other on the 29th December, 1888, before Frederick Zengel, notary.

In each will his entire estate was disposed of. In that of 19th April, 1888, known as the "Christy" will, he bequeathed, after payment of the special legacies therein made, "the residue of his property" to the Christian or Campbellite church, at Hopkinsville, Ky., and to the Baptist church at the same place.

In the second will, known as the Zengel will, he at first bequeathed, after the special legacies therein made, "the remainder of his estate" to his nephew, Philip Short Sims, but before signing his name "declared to the notary, in presence of the witnesses, that he amended and modified his will as before written, by bequeathing the remainder and residue of his estate, after the discharge of the legacies therein made, in equal shares and interests to all of the therein-before named legatees, to be possessed by them share and share alike."

Both of those wills were probated by the Civil District Court.

The deceased left considerable property, real and personal, in Louisiana, and real estate in Tennessee, Alabama and Kentucky.

Mrs. Margaret Short Moran, wife of William J. Moran, who was a legatee in the Christy will for four thousand dollars, and in the Zengel will for two thousand dollars, instituted an action to which all parties holding adverse interests were made defendants, asking the annulment of the Zengel will and the recognition and enforcement of that executed before Christy.

The plaintiffs and appellants herein filed an answer in that case, in which they say "for answer to the petition of Mrs. Margaret Short Moran to annul the writing purporting to be the will of Robert Short, dated December, 1888, they admit that said public act passed before Fred. Zengel, notary, is null and void and of no effect, because (1) all of its dispositive provisions were not dictated by Robert Short to the notary in the presence of the witnesses, nor (2) were all of the provisions written by the notary as dictated in the presence of Robert Short and in the presence of three witnesses, nor (3) were all of its dispositive provisions read aloud to Robert Short

by the notary in the presence of three witnesses, observing all these formalities without interruption and without turning aside to other acts, and these respondents admit that the said act of 19th April, 1888, is null and void, and pray that it be so decreed, and they deny all the other allegations of the petition of the said Margaret Short Moran, and they aver that the said Robert Short died intestate. * * * Now these respondents show that the writing of 29th December, 1888, purporting to be the last will and testament of Robert Short, is null and void and of no effect, not only for the fatal defects of form already alleged but also because he was not of sound and disposing mind and memory at the time of the execution of the said instrument, and was insane at that time and was under the control of the will of another. They further allege that the writing purporting to be the last will and testament of Robert Short, passed before George W. Christy, is null, void and no effect, and should be so decreed, and the demand for its execution rejected."

The answer, after enumerating a number of objections in the preparation of the will, closes by alleging that at the time of the making of the same Robert Short was not of sound and disposing mind and memory; that he was insane and incapable of making a will. It then proceeds as follows: "And these appearers assuming the attitude of plaintiffs in reconvention against Mrs. Margaret Short Moran pray that her demand for the annulment of the will of 29th December, 1888, be granted, and that her demand for the establishment of the will of 19th April, 1888, be rejected, and said act be declared null and void and of no effect, and that it be decreed that Robert Short died intestate, and that your petitioners (naming each of the present plaintiffs) be recognized as his heirs."

They prayed for citation to the attorneys of absent heirs, the various legatees, the executor of the will of April 19, 1888, and the executor of the will of 29th December, 1888, and that petitioners have judgment in conformity to their allegations, and rejecting both wills.

Some of the parties cited submitted the issues raised in the pleadings of the plaintiff, Mrs. Moran, and of the reconventional demand to the decisions of the court; others filed general or special denials or made special admissions, as their different interests dictated.

The District Court upon these issues adjudged the Zengel will null, but upheld that executed before Christy—dismissing the reconventional demand.

In his reasons for judgment, the district judge disposed summarily of the Zengel will by the statement that "the will of December 29, 1888, is conceded by all parties to be of no effect."

The succession of Robert H. Short has not been closed; it is still under administration in the District Court. The rights of parties have not yet been definitely ascertained and fixed. In the present proceeding the District Court upheld the validity of the Zengel will, which it had before pronounced of no effect—the judge in his judgment stating, as he did in his testimony taken in the case, that the first judgment was substantially, in his opinion, a consent decree; that acting upon that hypothesis he had not given the will the consideration and thought which he would have done had it been contested in the first as it was in the last case; that had the matter been presented to him originally as it was afterward, he would have sustained and not rejected the will.

The first position contended for by the plaintiffs and appellants is that the exception of prematurity filed by the defendants is not before us, it having been abandoned by consent.

The second is that "prematurity *vel non* of the action is not dependent upon whether the succession of Short has been or ever will be administered."

The exception was not waived. The record entry states "that by consent of counsel the exceptions are referred to be tried with the merits," and the answer filed was "under benefit and reservation of the exceptions."

A consent that they should be "tried" with the merits does not, under such circumstances, merge them into the answer.

Were appellants' contention in their first point true, they would have still to maintain the correctness of the second, which is "that their right of action arose when Mrs. Moran brought suit to annul the Zengel will and had the probate and the will set aside; that whether or not plaintiffs had established the amount of their loss was another question. That the act which occasioned their loss and gave them a cause of action was the fault of the notary in failing to make a valid will."

We do not think that the act of a notary in failing to comply with the formal requirements of the law in the preparation of a will, carrying with it as a result the rejection of the will, gives rise neces-

sarily *per se* to an action against the notary by a party named as a legatee in the rejected will. The setting aside of the instrument would in many instances enure to the benefit instead of to the injury of the legatee. The case at bar is itself an instance of the truth of this statement. The plaintiffs here, as heirs at law of the deceased, would receive a large portion of his estate if he should be held to have died intestate, whilst the upholding of the will would take from the heirs the entire succession, leaving them special legatees for a trifling amount. But for the fact of the existence of the prior will of April 19, 1888, plaintiffs' obvious interests were that the Zengel will should be declared null, and even with the Christy will s anding between them and their position as legal heirs, they deemed the Zengel will an obstacle in the way of those interests, and sought by affirmative action to get rid of it.

Plaintiffs' conduct indicated a rejection of the legacy made to them in the Zengel will. The attack upon that instrument was part of a general plan to get into position as legal heirs of Robert Short, through a repudiation of and setting aside of both wills.

We th nk that where a will has failed of probate by reason of the fault of a notary in the drawing of the instrument, a person who predicates an action upon that fact must also allege and prove injury. Injury must concur with error, and the extent of the injury would be the measure of the plaintiffs' rights. It matters little practically in this case whether we deal with the question of prematurity from the standpoint of an exception taken to the action or that of a failure by the plaintiffs to allege and prove a condition of affairs giving rise to the action and entitling them to a judgment. There is no claim or pretention in plaintiffs' petition that the succession of Robert H. Short has been settled and the rights of parties finally ascertained and fixed. It is true plaintiffs in one allegation aver as a conclusion that they have been damaged to the extent of their legacies, but there is no fact stated, save the fact itself of the setting aside of the will and a declaration that the succession of Short is solvent, on which such a conclusion could be based. The solvency of the succession is anything but certain. We do not feel warranted in the present situation of the Short estate, and under the pleadings, in examining into and adjudicating piecemeal upon the issues raised in this litigation. It will be time enough to do so as a whole when we will have to deal with facts and not conjectures.

In his reasons for judgment, the district judge disposed summarily of the Zengel will by the statement that "the will of December 29, 1888, is conceded by all parties to be of no effect."

The succession of Robert H. Short has not been closed; it is still under administration in the District Court. The rights of parties have not yet been definitely ascertained and fixed. In the present proceeding the District Court upheld the validity of the Zengel will, which it had before pronounced of no effect—the judge in his judgment stating, as he did in his testimony taken in the case, that the first judgment was substantially, in his opinion, a consent decree; that acting upon that hypothesis he had not given the will the consideration and thought which he would have done had it been contested in the first as it was in the last case; that had the matter been presented to him originally as it was afterward, he would have sustained and not rejected the will.

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A consent that they should be "tried" with the merits does not, under such circumstances, merge them into the answer.

Were appellants' contention in their first point true, they would have still to maintain the correctness of the second, which is "that their right of action arose when Mrs. Moran brought suit to annul the Zengel will and had the probate and the will set aside; that whether or not plaintiffs had established the amount of their loss was another question. That the act which occasioned their loss and gave them a cause of action was the fault of the notary in failing to make a valid will."

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sarily *per se* to an action against the notary by a party named as a legatee in the rejected will. The setting aside of the instrument would in many instances enure to the benefit instead of to the injury of the legatee. The case at bar is itself an instance of the truth of this statement. The plaintiffs here, as heirs at law of the deceased, would receive a large portion of his estate if he should be held to have died intestate, whilst the upholding of the will would take from the heirs the entire succession, leaving them special legatees for a trifling amount. But for the fact of the existence of the prior will of April 19, 1888, plaintiffs' obvious interests were that the Zengel will should be declared null, and even with the Christy will s anding between them and their position as legal heirs, they deemed the Zengel will an obstacle in the way of those interests, and sought by affirmative action to get rid of it.

Plaintiffs' conduct indicated a rejection of the legacy made to them in the Zengel will. The attack upon that instrument was part of a general plan to get into position as legal heirs of Robert Short, through a repudiation of and setting aside of both wills.

We th nk that where a will has failed of probate by reason of the fault of a notary in the drawing of the instrument, a person who predicates an action upon that fact must also allege and prove injury. Injury must concur with error, and the extent of the injury would be the measure of the plaintiffs' rights. It matters little practically in this case whether we deal with the question of prematurity from the standpoint of an exception taken to the action or that of a failure by the plaintiffs to allege and prove a condition of affairs giving rise to the action and entitling them to a judgment. There is no claim or pretention in plaintiffs' petition that the succession of Robert H. Short has been settled and the rights of parties finally ascertained and fixed. It is true plaintiffs in one allegation aver as a conclusion that they have been damaged to the extent of their legacies, but there is no fact stated, save the fact itself of the setting aside of the will and a declaration that the succession of Short is solvent, on which such a conclusion could be based. The solvency of the succession is anything but certain. We do not feel warranted in the present situation of the Short estate, and under the pleadings, in examining into and adjudicating piecemeal upon the issues raised in this litigation. It will be time enough to do so as a whole when we will have to deal with facts and not conjectures.

What we say here has reference to the claim set up on behalf of the minors.

We have enough before us to pass finally upon the claims of Arthur H. Murray, advanced individually by him, and those of Mrs. Juliette Murray, wife of Philip S. Jones.

We are of the opinion that those parties by seeking to avail themselves of the alleged errors of the notary against the other legatees under the Zengel will, and as part of a general plan to get into position as heirs of Robert H. Short, should not, though their efforts proved futile by reason of the prior will, be permitted to subsequently turn back upon the notary, whose errors they had deemed beneficial and had sought to utilize in their own behalf as instruments of attack. Plaintiffs cite us to the principle announced in the decisions quoted in the American and English Encyclopedia of Law, Vol. 7, Note 2, Verbo "*Estoppel*," to the effect that parties are not bound by allegations *unsuccessfully* pleaded. We do not think that principle applicable to this case. It may be that when parties attack a will for fraud, for insanity, or on other grounds, and fail in their attack from resistance made, they can still claim the benefit of any provision in their favor to be found in the will, as estoppel would meet estoppel, but we do not think the doctrine goes to the extent contended for here. We think it perfectly clear that it was the desire, the interest and the intention of the major heirs to free themselves from the effect of both wills. To that end in furtherance of that object they affirmed and adopted, and by so doing condoned, the errors (if such they were) of the notary. They can not be allowed to repudiate now as wrongful and injurious that which they had previously availed themselves of and advanced and relied upon and sought to utilize as a basis for acquiring beneficial rights.

In examining the record we notice that while Mrs. Juliette Murray, wife of Philip S. Jones, was, by the Zengel will, made a legatee for five hundred dollars, she is by the Christy will a legatee for one thousand dollars.

For the reasons herein assigned it is ordered, adjudged and decreed that the judgment appealed be and the same is hereby affirmed in so far as it concerns Arthur H. Murray individually, and Mrs. Juliette Murray Jones, wife of Philip S. Jones.

It is further ordered, adjudged and decreed that as concerns the minors Arthur Murray Dargan, Camelia Alice Dargan and Bertie

Lucie McDonald, the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that there be judgment against the said minors on their demand as in case of non-suit.

Miller, J., recused.

Rehearing refused.

No. 11,434.

46 467
113 282

STATE NATIONAL BANK OF NEW ORLEANS VS. PIERRE LANAUX AND THEODORE VENISSAT.

On motion to dismiss an appeal, on the grounds of acquiescence in and voluntary execution of the judgment, this court will not determine the question on *ex parte* affidavits filed first in this court in the absence of admission of their truth by the appellant, but will remand the case to the lower court, in order that evidence may be heard and a record returned to this court for final action.

APPEAL from the Twentieth District Court, Parish of Assumption. *Guion, J.*

J. McConnell and *H. E. Upton*, of Counsel, for the motion:

Acquiescence by appellant in the judgment appealed from defeats the right of appeal. 40 An. 201.

On motion to dismiss, on the ground that appellant has acquiesced in the judgment, evidence of this fact can not be introduced before the Supreme Court; the case must be remanded to try that issue. 28 An. 572; 3 An. 115; 23 An. 37; 20 An. 574; 29 An. 576; 39 An. 225.

No appeal can be taken by one who even partially executes the judgment. 28 An. 743; 18 An. 59; 18 An. 264; 4 An. 150; 14 L. 523; 37 An. 581.

Beattie & Beattie of Counsel, *Contra:*

It is settled jurisprudence that any waiver or renunciation of the right to appeal must be plain and unequivocal. Leggett vs. Peet *et al.*, 1 La. 296; Yale & Co. vs. Howard, 24 An. 458; Johnson, Tutrix, vs. Clark & Meader, 29 An. 762; Hoey & O'Connor vs. Brown, 29 An. 861; Verges vs. Sheriff, 33 An. 413; Jackson vs. Michie *et als.*, 33 An. 727.

Mere passive submission to a judgment or order of court is not acquiescence which prevents appeal.

To preclude an appeal by acquiescence some act must be done; mere failure to act is not enough. C. P. 567.

ON MOTION TO DISMISS THE APPEAL.

The opinion of the court was delivered by

BREAUX, J. The appeal was taken by Theodore Venissat, one of the defendants.

The grounds for the dismissal of his appeal are that the defendant and appellant, as well also as his co-defendant, who is an appellee, have acquiesced in the judgment or order of sale appealed from by permitting the order or judgment appealed from to be executed without objection, opposition or protest.

The appellee annexes exhibits to his motion, consisting of affidavits setting forth, substantially, that although present in the parish of Assumption at the date of seizure of the property and at the date the plantation seized under the writ of seizure and sale was sold and adjudicated to the plaintiff, the State National Bank of New Orleans, the defendant and appellant, remained quiescent and offered not the most remote opposition.

That he was in the actual possession of the plantation at the date of seizure and when it was sold.

That the expenses of cultivating the plantation from the date of seizure were paid by the plaintiff bank.

That a short time after the adjudication to it, the bank sold the property to Ernest Roger.

That after the latter's purchase, the defendant and appellant having continued to occcupy the dwelling on the plantation, he was notified to vacate.

He complied with the notice and delivered possession.

General averments are made by the opponents, all to the effect that the appellant acquiesced in the judgment.

Able counsel for the defendant and appellant have not presented any argument in opposition to the motion.

In argument, the appellee, the bank, does not ask that these *ex parte* affidavits be passed upon by the court, but rely upon them in

support of their application to remand the case. They also urge that other facts be heard prior to decision.

It occurs to us that the interest of the appellant in this appeal is not at all manifest.

Though we do not finally pass upon that question, we think it of sufficient importance to give it some consideration in remanding the case. It has generally been held that a sale under execution, after the delay for a suspensive appeal, passes title, though the judgment is subsequently annulled, on the principle that the destruction of a power does not carry with it the destruction of the effect previously produced by the power. Factors and Traders' Insurance Company vs. New Harbor Protection Company *et al.*, 37 An. 233; Farrar vs. Stacey, 2 An. 211; Williams vs. Gollien, 1 R. 94; Baillie vs. Wilson, 5 M. N. S. 214.

It is therefore ordered that the case be remanded to the lower court, with instructions to the judge to hear evidence contradictorily on the questions of acquiescence and send up the record thereof, according to law.

Rehearing refused.

No. 11,463.

WALTER A. SIMONDS VS. P. P. MCMICHAEL, SHERIFF, ET AL.

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Whilst the stipulation in an act of mortgage that in the event suit becomes necessary for its enforcement the mortgagor is to pay attorney's fees, and only on the happening of that condition are such fees due, yet it is the duty of the mortgagee to make a timely legal tender of the principal and interest of the debt, in order to prevent the institution of suit, and save himself the payment of attorney's fees.

APPLICATION from the Sixteenth District District Court, Parish of Tangipahoa. *Reid, J.*

Jos. A Reid Attorney for Plaintiff and Appellee.

Stephen D. Ellis, James Legendre and *Gug M. Hornor* Attorneys for Albert Baldwin, Defendant and Appellant:

Injunction to restrain the execution of an order of seizure and sale by the debtor only lies in cases prescribed by Article 739, Code of Practice. Dupré vs. Anderson, 45 An. 1114.

Attorney's fees form part of the capital, so that when the face amount of the note only is paid, it can not be said that the claim is satisfied. The fees of the attorneys remaining unpaid have to be satisfied out of the proceeds. Zimmermann vs. Langles, 36 An. 65; Mullen vs. His Creditors, 39 An. 398; Levy, Jr., vs. Beasley, 41 An. 834.

Ten per cent., stipulated in an act of special mortgage as attorney's fees in case judicial proceedings are necessarily resorted to, is in the nature of damages and is covered by the mortgage, and the mortgagee is entitled to collect same, as well as the capital and interest of his debt, all being of equal rank and dignity. Succession and Community of G. Duhe, 41 An. 210.

When the tender is for money due it must be made to the creditor himself, or at his actual or chosen domicile, by the debtor or his agent, in the presence of two witnesses residing in the place, by tendering to such creditor the sum which is due to him, with the interest and such costs as he may have incurred, and exhibiting such sum to him in the presence of such witnesses, in the current money of the United States. Code of Practice, Art. 407.

It is not necessary to allege or prove an amicable demand before suing out executory process. Renshaw vs. Richards, 30 An. 398; Roman vs. Denney, 17 An. 127.

The mortgagee, with the *pact de non alienando*, may proceed against the original mortgagor, no matter how many transfers of the property have been made. Stevens vs. Pinneo, 26 An. 617.

Joseph A. Reid Attorney for Appellee asking a rehearing:

The only reasons no appearance was made for plaintiff and appellee were that the attorney for plaintiff was waiting to see the brief of defendant, with which he was never served until March 16, 1893, and the return day for appeals from Tangipahoa parish to this Honorable Court conflicts with the return day of the Circuit Court of Appeals to that tribunal.

This appeal was not suspensive, and plaintiff's attorney believed himself entitled to a copy of appellant's brief before submitting his own.

This court is without jurisdiction; the amount in dispute is not over three hundred and fifty dollars.

The peremptory refusal of an offer to pay dispenses with the actual production of the money in the presence of witnesses as required by Art. 407, C. P. No one is required to do a vain thing. 26 An. 453; 12 An. 793; C. P. 413.

To make a tender valid it is only necessary to place the money in the creditor's power. 12 An. 246.

The law does not require the idle ceremony of a tender where the creditor refuses payment, such refusal implying a waiver of it. 7 M. 218; 36 An. 68; 1 La. 273; 30 An. 883; 4 An. 344; 27 An. 111; 27 An. 210.

There was no necessity for any suit and no attorney's fees are due. 36 An. 70.

The opinion of the court was delivered by

WATKINS, J. This is an injunction suit against an executory proceeding in the enforcement of a special mortgage on property of which the plaintiff alleges himself to have been in the actual and undisputed possession, under duly recorded titles, at the date of and antecedent to the seizure of the creditor.

The grounds on which his injunction is predicated are: (1) That he had not been judicially notified, prior to the issuance of the writ of seizure and sale, to pay the debt of the original mortgagor; (2) that no copy of the petition for and order of seizure and sale was served on him anterior to the seizure, notwithstanding he had specially assumed to pay this mortgage indebtedness as a part of the purchase price; (3) that the original mortgagors have been discharged from the payment of said indebtedness, and are not necessary or real parties to the executory proceedings, and he has not been made a party to the same; (4) that the plaintiff in executory proceedings made demands of him by letter for the payment of the mortgage note, and he directed its presentation at the counter of a certain bank in the city of New Orleans, La., for the payment of the principal and interest, and this offer was declined, because he had not directed and requested the payment of ten per cent. attorney's fees, he disclaiming that any attorney's fees were, at the time, due, the recital of the act of mortgage being that ten per cent. attorney's fees were only due in the event of suit becoming necessary.

He avers his readiness and willingness to pay the capital and interest of the note at any time.

Setting out a state of circumstances indicating that the suit was vexatious, he claims two hundred dollars attorney's fees, and five hundred dollars for wanton injury inflicted by the seizure of his property; and his prayer is for a judgment for said amounts and the perpetuation of his injunction.

The answer of the seizing creditor is a general denial, coupled with the special averment that he has sustained damages to the extent of two hundred and fifty dollars, in attorney's fees, occasioned by his wrongful injunction. His prayer is for the dissolution of the plaintiff's injunction, with two hundred and fifty dollars for attorney's fees and twenty per cent. statutory damages.

On the trial there was judgment in favor of the plaintiff, perpetuating the injunction as to the ten per cent. damages claimed in the executory proceedings; but same was dissolved, in all other respects the cost of suit being put on the seizing creditor, as defendant.

It is from that judgment that the defendant has appealed.

In this court the plaintiff and appellee has made no appearance; has filed no answer; consequently, the controversy is limited to the claim of the appellant.

In brief and argument appellant's counsel make the point (1) that no cause is assigned for an injunction conformable to C. P. 739, and for that reason the injunction must be dissolved; and (2) that he is, under the law, entitled to the attorney's fees stipulated in the act of mortgage; also to one hundred dollars special damages for attorney's fees, and twenty per cent. statutory damages.

I.

On the first point appellant places reliance on the provisions of C. P. 739 as interpreted by this court in Dupre vs. Anderson, 45 An. 1114. True it is that they sustain his view, but it was his duty to have accepted, preliminarily, on that ground; for had he done so the plaintiff's injunction would have been dissolved. But the defendant, having elected to join issue with the plaintiff by answer, is necessarily restricted to those issues.

II.

On the second proposition the evidence shows that the plaintiff had sufficient money to his credit in the Bank of Commerce of New

Orleans to cover the principal and interest of the note, as well as the attorney's fees stipulated in the act of mortgage; but it fails to show a legal tender to the mortgagee of the amount of the capital and interest of the mortgage debt sued on, notwithstanding he had, antecedent to suit, expressed a willingness to pay that amount, though the attorney of the mortgagee declined to accept same in full discharge, insisting on the payment of the ten per cent. that is stipulated in the act of mortgage as attorney's fees.

That stipulation is as follows, to-wit:

"In case it shall become necessary to institute legal proceedings for the recovery of the amount of said notes, or any part thereof, the said purchasers do hereby bind themselves to pay the fees of the attorney who may be employed for that purpose, which are fixed at ten per cent. on the amount which may be sued for."

On this presentation of fact we are clearly of the opinion that plaintiff has become liable for the amount of attorney's fees stipulated in the contract.

At the same time we think it clear that he was not liable or responsible for those fees previous to the institution of legal proceedings, and that he could have discharged himself from their payment, by making a seasonable legal tender in conformity to the provisions of Article 407, Code of Practice. Zimmerman vs. Exrs. of Langles, 36 An. 65; Mullen vs. His Creditors, 49 An. 397; Levy vs. Beasley, 41 An. 832; Succession of Duhé, 41 An. 209.

Notwithstanding the plaintiff's expressed willingness to pay the debt and interest, leaving, as the *only* matter in controversy between the parties, at that time, the claim of the mortgagee's attorney for his fees, yet he met the mortgagee's executory proceedings with an injunction based on various *other* grounds, that were ruled against him on the trial, and he has apparently acquiesced in the judgment.

III.

Though proof was adduced in support of defendant's claims for attorney's fees as damages sustained in this suit, in consequence of procuring the dissolution of the plaintiff's injunction *pro tanto*, yet it is limited to one hundred dollars, and for this amount judgment was pronounced in his favor in the lower court. This court has repeatedly held that damages will not be allowed on the dissolution of injunction, except in cases when execution to enforce moneyed

judgments are enjoined. Gunn vs. Reagan, 32 An. 974; Morris vs. Bienvenue, 30 An. 878; Verges vs. Gonzales, 33 An. 410; Boyer vs. Sheriff, 40 An. 657.

It has also been repeatedly held that when a writ of seizure and sale is arrested by injunction which is afterward dissolved, the seizing creditor can not obtain his damages by the judgment dissolving the injunction, but must bring an action on the bond.

An order of seizure and sale is not a moneyed judgment, in the sense of Article 304 of the Code of Practice. Dejean vs. Hebert, 31 An. 729; Thompson vs. Lemlee, 32 An. 932; Burgess vs. Gordy, 32 An. 1296; Hodgson vs. Roth, 33 An. 941.

In terms, the code declares that, in case the injunction is dissolved, the plaintiff shall be condemned "in the same judgment * * * to pay to the defendant interest, at the rate of ten per cent. interest on the amount of the judgment." Article 304. Hence we can not award the defendant the twenty per cent. he demands—this injunction being directed against an order of seizure and sale—but we are powerless to so alter or amend the judgment in respect to the plaintiff who has not appealed, and has not joined issue with the defendant in his appeal. Laloire vs. Wiltz, 31 An. 436; White vs. Baptist Church, 31 An. 521; Succession of Forestall, 32 An. 97.

The judgment appealed from must be so amended as to award the seizing creditor ten per cent on the amount of the mortgage debt that is sought to be enforced, as attorney's fees.

It is therefore ordered and decreed that the judgment appealed from be so amended as to allow the defendant, as seizing creditor, the sum of ten per cent. on the amount of the principal and interest of the mortgage debt, as attorney's fees; and that as thus amended, same is affirmed, at the cost of the plaintiff and appellee in both courts.

Rehearing refused.

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No. 11,356.

THOMAS EGAN, JR., VS. CHARLES M. FUSH.

1. It is more than doubtful whether a sequestration will lie antecedent to the maturity of the debt sued on in any case except that indicated in Code of Practice, Art. 275, par. 6.
2. Conceding *arguendo* that the dismissal of an original petition does not necessarily dissolve a sequestration issued under it, and that the *status quo* of a seizure under it may be saved by a supplemental petition subsequently filed, yet, in order that same be rendered efficacious, it must be sworn to.

3. That in case the *original* suit and sequestration have proceeded on the theory that the debt is due at time of filing, a *supplemental* petition alleging the new and substantial fact that the debt has *become due since the suit was filed* changes the substance of the original demand in an important particular.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

Frank McGloin for Plaintiff and Appellee:

Objections to a writ of sequestration must be specially pleaded and a defendant can not advance new objections on appeal. Wells vs. St. Dizier, 9 An. 119.

One having a special mortgage or privilege upon property can, for proper cause, sequester same before the maturity of his debt. 14 La. 531; 17 La. 209; 4 An. 184; 23 An. 578; 23 An. 612.

Where a creditor has a special privilege upon particular property he is entitled to sequester same upon merely swearing that he fears the removal, etc., of same. C. P. 275; 40 An. 825. This rule applies whether the debt be due or not.

Conservatory writs are *stricti juris*, but the courts can not impose conditions other than those established by the Legislature. Creditors entitled to sequestrations are not required by the Code of Practice, Art. 275, to do more than to swear to their own fears. 40 An. 825.

Where a creditor has sequestered before the maturity of his debt, he may, upon the arrival of the date of maturity, file a supplemental petition demanding judgment *in personam*. 17 La. 209; 23 An. 612.

The sale of the property affected by the privilege, in whole or substantial part, without paying or securing the debt, warrants the issuance of the writ of sequestration. 35 An. 488; 39 An. 761.

Non-payment of the debt, at maturity, justifies the sequestration. 40 An. 825.

While a writ must stand or fall according to the conditions at the time of its issuance, yet where the intentions of the debtor are matters of inquiry, his conduct immediately subsequent may be looked to with a view to ascertainment of such intent.

W. S. Parkerson Attorney for Defendant and Appellant:

Sequestration must depend upon the state of facts existing at the inception of suit.

Suit brought upon an obligation not due must be dismissed.

An amendment setting up facts, arising since the inception of suit, and changing the substance of the demand, will not be allowed.

Sequestrations like attachments are *strictissimi juris*, and every detail must be complied with, otherwise proceedings will be stricken with nullity.

Petition being dismissed for prematurity, the supplemental petition not being allowable, there is no suit, and the sequestration must be dissolved.

The opinion of the court was delivered by

WATKINS, J. Suit was filed on the 23d of February, 1893, upon a promissory note maturing on the 18th of March following, accompanied by a writ of sequestration.

On the 27th of February following, the defendant moved to dissolve the sequestration upon two grounds, to-wit:

First, that the allegations of the petition are untrue.

Second, that the debt sued on was not due at date of suit.

On the 2d of March thereafter, defendant filed an exception of prematurity and no cause of action.

On the 9th of March the plaintiff filed a supplemental petition, setting up the maturity of the note sued on since the filing of the original petition.

On the 20th of March, 1893, the defendant filed an exception to the supplemental petition, on the ground that it changed the substance of the demand of the original petition, and was consequently inadmissible.

On the trial the exceptions were overruled as to the supplemental petition, the original petition was dismissed and the sequestration allowed to stand—the court *a qua* treating the supplemental petition, *in personam*, filed after the maturity of the note, and several days subsequent to the making of the affidavit, as the *inception* of the suit.

Subsequently the defendant filed an answer, reserving the benefit of his exceptions, and the cause went to judgment in favor of the plaintiff for the amount of his debt, sustaining the writ of sequestration, and enforcing the vendor's lien upon the property seized, and the defendant has appealed.

From the foregoing analysis of the pleadings and issues in this case, it is evident that the determinative questions are, first, whether the sequestration should have been dissolved on account of the alleged prematurity of the suit; second, whether the plaintiff's supplemental petition changed the substance of his original demand.

Reference to the petition discloses that suit was filed on the 23d of February, 1893, upon an unconditional obligation of the defendant, bearing date September 1, 1892, and maturing on the 1st of March following. That the prayer thereof is, "that, after due proceedings, there be judgment in favor of petitioner and against (the defendant) in the full sum of two thousand six hundred and sixty-six dollars and sixty seven cents, with vendor's privilege on the property described, and interest as claimed at eight per cent.," etc.

Alleging his vendor's lien upon certain movable property described as being in the defendant's possession, and swearing "that affiant fears that (the defendant) will conceal, part with, or dispose of" same during the pendency of the suit to the prejudice of his vendor's lien, the petitioner claimed and obtained a sequestration.

On this showing there is no doubt that suit was filed before the debt became due, and that an *absolute and unconditional judgment* was prayed for before same went to its maturity. Consequently, the exception of prematurity was well grounded, and the original petition was correctly dismissed by the judge *a quo*.

But just here the two preceding contentions enumerated arose in the court below—the judge maintaining the sequestration and holding the supplemental petition to be consistent with the original petition, and the inception of the suit.

I.

Was the sequestration properly issued, or correctly maintained—the original petition having been dismissed?

The supplemental petition was filed on the 9th of March, 1893, subsequent to the maturity of the debt, and also to the filing of defendant's exception of prematurity. It does not contain the reiteration of all the averments and charges of the original petition and is unaccompanied by any additional averment to the effect that the cause for the issuance of the writ of sequestration continued to exist, and no additional affidavit was made, order obtained, or bond

given in connection therewith. There is no provision of the Code of Practice which authorizes the issuance of a writ of sequestration *before the debt secured becomes due*, as in a case of attachment and provisional seizure. C. P. 275 *et seq.*, 244, 287.

But in such case the code makes *special allegations* in the petition and accompanying affidavit necessary and essential. For instance, in reference to an attachment, its requirement is "that in cases where the debt or obligation is not yet due, such an attachment may be granted * * * and it shall be lawful for any judge * * * to order a writ of attachment to issue whenever said judge shall be satisfied * * * of the existence of said debt * * * and swears that said debtor *is about to remove his property out of the State before said debt becomes due*" etc. C. P. 244.

In reference to a provisional seizure its requirements are "that it shall be sufficient to entitle a lessor to obtain said writ to swear to the amount which he claims, whether due or not due, and that he has good reasons to believe that said lessee will remove the furniture or property on which he has a lien or privilege out of the premises, and that he may be thereby deprived of his lien," etc. C. P. 287.

But these provisions are restricted to the issuance of the two conservatory writs mentioned, and do not apply to the main demand for the debt of the defendant. Clearly, it is contemplated by these articles that the fact must be set out affirmatively that the debt declared upon is *not due* at time of filing of the suit, accompanied by the formal and specific allegation of the other facts mentioned therein as rendering the process necessary antecedent to the maturity of debt. These provisions are exceptional, and to be strictly construed, and not to be extended to any other cases not covered by them.

There is no corresponding provision of the code applicable, in terms, to the issuance of a writ of sequestration *prior to the maturity of the debt* sued upon; though this court has so interpreted paragraph 6 of Article 275 of the code, as to warrant its issuance prior to the maturity of the debt, in an *exceptional* class of cases, not including the instant case.

The language of this paragraph is as follows, viz.:

"A creditor by special mortgage shall have the power of sequestering *mortgaged* property when he apprehends that it will be *removed out of the State before he can have the benefit of his mortgage, and will make oath of the facts which induced his apprehension.*" (Our italics.)

In Neilson vs. Pool, 17 La. 209, this interpretation was placed upon the provisions of that article. The note sued on in that case became due on the 1st of December, 1839, and suit was commenced on the 3d of September preceding—plaintiff alleging that his debt was not then due, and that same was secured by a *mortgage and privilege* on the defendant's crop, which he verily feared and believed it was his intention to "remove beyond the jurisdiction of the court, and out of the State before his debt becomes due, and deprive him of the only security he has for the payment of his debt."

And his prayer was that the crop be sequestered, and that he have judgment for the amount of his note when same fell due, recognizing his mortgage and privilege.

The court states that "on 1st of February, 1840, a supplemental petition was filed setting forth the *same facts* and containing the *same allegations*, except as to the sequestration, which had been already obtained, praying for *judgment on the note* with a privilege or lien on the crop," etc.

On these averments a judgment by default was taken, upon the original and amended petitions, and subsequently the defendant filed an answer, one averment of which was to the effect that the suit was premature and the sequestration without cause.

But these defences did not prevail, and judgment went against the defendant on his note and mortgage, recognizing and enforcing the plaintiff's lien on the crops sequestered.

In the instant case no mortgage is alleged, and neither the plaintiff's petition nor affidavit contains any averment that the defendant's intention was to remove the property on which he claims a privilege "out of the State before his debt became due."

The case of Gardner vs. Shipley, 4 An. 184, was predicated upon allegations quite similar to those quoted from Neilson vs. Pool, and thereto a similar exception of prematurity was urged and with like results; and the court in its opinion said:

"The argument presented by the opposite party is that the debt being unmatured could not be sued for, and the right to a sequestration, being a mere accessory right, must follow the fate of the principal demand. *The text of the law does not require, in terms, that the debt secured by the mortgage or privilege should have matured; (but) certainly its spirit is conservative, and, in our opinion,* embraces the present case"—citing with approval the case of Neilson vs. Pool.

But it is necessary in order to sustain a writ of sequestration under the cited article of the code, that its requirements be rigidly and closely pursued; for it was held in Clark vs. Glover, 14 La. 266, that an affidavit stating that the plaintiff "fears (that) the defendant may remove the mortgaged stock out of the jurisdiction of the State" is insufficient to obtain an order of sequestration; that it "should state *the facts which induce his apprehension.*"

In that case the property sequestered was a slave, and "the alleged ground for obtaining this order was their apprehension that the slave would be removed out of the State," and the sequestration was dissolved because of the insufficiency of the affidavit.

The court adhered to the doctrine of the above cited cases and quoted them approvingly in Bres, Executor, vs. Booth, 1 An. 307, and held that "to entitle a plaintiff to sequester *mortgaged* property, on the ground of his apprehension that it will be removed out of the State before he can have the benefit of his mortgage, he *must make oath to the facts which induce his apprehension.* It is not sufficient to swear that he apprehends the removal." C. P. 275, paragraph 6.

It is evident, that while maintaining writs of sequestration issued under the provisions of that *particular paragraph*, prior to the maturity of the debt, for the reason that such is believed by the court to be the *spirit* of the law, it intended to require of litigants the strictest adherence to the requirements thereof in procuring same, and not to extend that relief to any other class of cases arising under other provisions of that article. Because the court was evidently not unmindful of the safe and conservative rule that has constantly been adhered to, that a sequestration can only issue when a party is clearly entitled to it, and it is expressly allowed. That it is a harsh remedy and not to be extended by implication to cases not contemplated by law. 4 R. 462; 2 An. 961; 6 An. 444; 9 An. 535; 2 An. 826; 4 An. 452; 37 An. 552, Pasley vs. McConnell.

The rule announced in the foregoing cases was again recognized in Catlett vs. Heffner, 23 An. 578, in which the court held that a *sequestration* may issue in accordance "with Article 275, C. P., but the *suit* can not be instituted before the maturity of the obligation."

In that case suit was filed on the 26th of November, 1868, to enforce the collection of a note maturing on the 1st of January follow-

ing. The petition alleged the existence of a *mortgage* to secure the debt, and the prayer of the petition demanded the issuance of a sequestration at date of filing suit, and an *absolute* judgment for the amount of the debt. To this petition the defendant tendered the exception of prematurity, and moved to dissolve the writ of sequestration; but same were overruled.

This court was of opinion that the plea of prematurity should have been sustained, and the court said:

"Because the plaintiff, under the state of facts contemplated by Article 275, C. P., may sequester the mortgaged property to prevent its removal from the State 'before he can have the benefit of his mortgage,' whether the same be due or not due, does not give him greater rights than the mortgage gave, or the debtors have consented he should have, as to the time at which he may enforce payment."

A like opinion was entertained in Duncan vs. Wise, 39 An. 74.

An attentive examination of adjudicated cases has not enabled us to discover one in which a writ of sequestration was permitted to stand, when issued *prior to the maturity of the debt*, in any other class of cases than the one mentioned in the cases cited, and then only on compliance with the requirements pointed out in the statute. It is evident that the plaintiff has not brought his case within those requirements, the averments of his petition not definitely fixing the date his debt went to maturity, though his prayer is for an absolute, unconditional judgment; there is no allegation that his debt was secured by mortgage, or that he apprehended that the property on which he has a privilege was about to be removed out of the State during the pendency of the suit.

The case of Warfield vs. Oliver, 23 An. 612, is relied upon as sustaining the proposition that the filing of a supplemental petition is the real commencement of the suit, and relates back to date of filing the original suit, and will maintain a writ of sequestration *in statu quo*, notwithstanding the original petition be dismissed on an exception to it as premature.

That case is not, however, in point, because the suit was brought upon a series of notes for rent, a part of which were due and a part not due; and defendant's exception was directed at those not due, and same was only to that extent sustained. Consequently, the writ was not dissolved as to the notes that were already due at time suit

was filed. But in the instant case suit was brought on a single note, which was not due, although absolute judgment is demanded on it. This allegation and accompanying prayer rendered defendant's exception necessary, and caused the dismissal of the suit *in its entirety.*

That such is the fate of a suit prematurely filed is attested by the opinion of our predecessors in Merz vs. Judge, 31 An. 120.

The case of Catlett vs. Heffner, 23 An. 577, is somewhat similar to the Warfield case, though instituted upon a single note not due, and secured by a *special mortgage*—thus relegating it to the exceptional class above mentioned. In that case the exception of prematurity was sustained, the suit dismissed and the sequestration dissolved.

In the case of Barrier & Bro. vs. Fiste, 9 An. 535, a sequestration was obtained of goods on which the plaintiffs claimed a vendor's lien—but no mortgage—the suit being founded on two notes thereafter to become due. To this suit and sequestration the defendant excepted, "on the ground that no case had been made by the pleadings and affidavits to authorize such remedy, and they also excepted on the ground of its prematurity."

The exceptions were sustained, the suit dismissed and the sequestration dissolved. On appeal to this court the judgment of the District Court was affirmed—the court simply stating that "the District Court took a correct view of all the questions raised by the appellants."

That case is exactly in point. Like the instant one it was brought on notes not due and secured by a vendor's lien. Upon the defendant's exception of prematurity the suit was dismissed and the sequestration dissolved.

This is the same exception and relief that is demanded on the part of the defendant. The two cases—that of Barrier and the instant one—are exactly parallel.

After diligent search we have been unable to find any decision of this court wherein that case has been overruled or a contrary doctrine maintained.

But while there seems to be no escape from the conclusion that the defendant's exception was well taken and should, in keeping with our jurisprudence, have been maintained *in toto*, yet, without pledging this court unalterably to this view, we are of opinion that we may safely place our decision upon a different footing, equally as fatal to the plaintiff's sequestration.

It is that the plaintiff made no oath to his supplemental petition, procured no additional order and obtained no new writ of sequestration.

On the authority of Lehman vs. Truxillo, 32 An. 65, an affidavit accompanying a supplemental petition is a *sine qua non* to the maintenance of a writ of sequestration issued under the original petition, and for the preservation of the *status quo* after the dismissal of the original petition. For "the supplemental petition," say the court, "set up the new and important fact that some four hundred dollars more were due plaintiff than the amount claimed in the original petition. These petitions should, therefore, have been sworn to, and new orders and new writs granted under them."

Inasmuch as no affidavit was made to the supplemental petition the sequestration was dissolved.

The same view was entertained and enforced in Gumble vs. Beer, 36 An. 487—a case of sequestration in the enforcement of a vendor's lien securing a debt past due. In the last case there was an affidavit accompanying the supplemental petition, but *no new order* was obtained, and the court held that it was unavailing and superfluous.

In the instant case the supplemental petition simply alleges the fact of the debt sued upon having reached maturity since the suit was filed, entitling plaintiff to judgment. This averment was of far greater importance to the plaintiff than that of the supplemental petition in the Lehman case, claiming only an *additional* sum of four hundred dollars. But it was not accompanied by any new or additional affidavit, order or writ, and no averment is made of the *continued* existence of the causes for which the original writ was issued.

Considering the well-grounded and ancient rule of our jurisprudence, that sequestration is a harsh remedy and must be construed and determined by the condition of things existing at date of issuance, the conviction is clear that the writ issued in the instant case must be dissolved at plaintiff's cost, for the reason that the plaintiff has failed to observe some of the essential requisites for its maintenance.

II.

But, in any event, we regard the defendant's exception to the supplemental petition good, same being that it changed the *substance* of his original demand by alleging that the note sued on had *become*

due since the institution of the suit, whereas the demand of his original suit was predicated upon an obligation as already due, and upon which demand prayer was made for an unconditional judgment.

In Bank vs. Moss, 41 An. 232, a case of attachment on a debt not due is presented, and to which the defendant tendered an exception of prematurity.

Pending the trial of the exception, the plaintiff tendered and caused to be filed a supplemental petition setting out the fact, as alleged in the supplemental petition in the instant case, of the debt having become due since the suit was filed.

Of this suit and exception the court say:

"The motion to dissolve was filed on the 8th of November, 1887, and plaintiff's right to its attachment was therefore at issue when the amended petition was filed. It thence follows that it can not be considered if it contains any substantial averment on the issue of the attachment which was not to be found in the original petition.

"By reference to the latter it will appear that neither of the drafts had matured at the date of attachment, or of the filing of the petition, while in the amended petition it is distinctly alleged that all four of the drafts had matured. * * *

"The state of things thus disclosed is as widely different from the position contained in the original pleadings as light differs from darkness.

"In other words, everything which, under law and jurisprudence, was lacking to justify the proceedings by attachment in the *original* pleadings is supplied by the lapse of time and by the happening of subsequent events, through the proposed *amended* petition. * * *

"From the very nature of things the events and proceedings therein described would not have a retroactive effect, so as to make it appear, on the 23d of September, that maturities to occur in October and November and December following had already taken place.

"To argue against the allowance of such amended pleadings, under the restricted issue to be herein discussed, is, after all, labor to prove a self-evident proposition. Hart vs. Bowie, 34 An. 325."

On the theory of that opinion, there can be no doubt of the supplemental petition in the instant case changing the *substance* of the demand in the original petition, for the stronger reason that the debt is alleged to be *due* in the *original* petition and absolute judg-

ment is prayed for, while in the supplemental petition the allegation is made that the debt *became due since the filing of the suit*—the two substantial and necessary allegations being in conflict.

Hence the defendant's exception to the supplemental petition was well grounded, and should have been sustained.

A very careful consideration of this case in all of its bearings has led us to the following conclusions, viz.:

First, that it is more than doubtful whether, in this class of cases, a sequestration is at all permissible antecedent to the maturity of the debt.

Second, that, conceding *arguendo* that the dismissal of an original petition does not *necessarily* dissolve the sequestration, and that the *status quo* of a seizure under it may be saved by a supplemental petition subsequently filed, yet, in order that same may be rendered efficacious, it *must* be sworn to.

Third, that in case the *original* suit and sequestration have proceeded on the theory that the debt is due at time of filing, a *supplemental* petition alleging the new and substantial fact that the debt has *become due since the suit was filed* changes the substance of the original demand in an important particular.

Being satisfied of these propositions, the plaintiff's sequestration can not stand; the supplemental petition must be dismissed.

It is therefore ordered and decreed that the judgment appealed from be reversed, and it is further ordered that the plaintiff's suit and sequestration be dismissed at his costs in both courts.

Rehearing refused.

No. 11,455.

HENRY BRYANT VS. MRS. E. R. STOTHART.

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The dissolving condition in the contract of sale can not be enforced when the plaintiff in the suit represents only part of the price remaining due. Civil Code, Arts. 2045, 2046; Lefiore vs. Camors, 7 An. 67; Castle vs. Floyd, 38 An. 589.

In the action to dissolve the sale for non-payment of the price, tender to the purchaser of the price he has paid is a prerequisite for maintaining the action and hence can not be dispensed with, on the ground that the purchaser's liability for the revenues compensates the price to be returned by the vendor. George vs. Knox, 23 An. 354; McDowell vs. Taylor, 14 An. 729; McKenzie vs. Bacon, 43 An. 534; 21 An. 425.

APPEAL from the Ninth District Court, Parish of Red River. *Hall, J.*

J. C. Egan for Plaintiff and Appellant:

This is a suit under Art. 2561 of the C. C. to enforce there solutory condition in a contract of sale and have its dissolution decreed for the non-payment of the purchase price. To have the sale dissolved for the failure on the part of the vendee to comply with her obligation to pay the purchase price, and to have the vendor restored to the title and possession of the property.

The vendor claims the fruits or revenues, at eight hundred dollars per annum, its rental value for three years, the time he will necessarily be out of the use of his property, before he can obtain a judgment of this court restoring him to the ownership and possession. He claims one thousand dollars for loss, consumption and deterioration of personal property, and asks that these amounts be allowed as a credit upon a liquidation and settlement between himself and his vendee. To compensate and offset the amount paid by Mrs. E. R. Stothart (one thousand seven hundred and eighty dollars) and that he have judgment against her for such amount, if any, as may be found due, after allowing her this credit of whatever may be shown due her for improvements.

A clear and concise statement of the object of the demand and nature of the title or cause of action on which it is founded is all that the law requires. C. P., Art. 172. Where facts are wholly within the knowledge of the defendant, she can not require them to be set forth in plaintiff's petition. The law requires impossibilities of no one. Cross on Pleading, Sec. 17, p. 95, and authorities there cited.

The action for a dissolution where a suit is necessary to enforce the resolutory condition is a putting *in mora*, as it may be met by paying the price, and the judge may even grant time for that purpose. This is not an action of rescission and is not in the cases provided for as contemplated by Art. 1912 of R. C. C. 28 An. 740; 15 An. 518; 40 An. 157: 23 An. 335.

Plaintiff is entitled to fruits from day of sale. C. C. 2045, 2041; 31 An. 635; 38 An. 766; 31 An. 67; 35 An. 112.

The stipulation *pour autre* in order to have any binding effect, must be accepted by the party in whose favor it is made. 5 R. 514; 3 N. S. 211; 22 An. 362.

No tender is necessary where plaintiff does not owe defendant. The payments can be offset against the rents. 41 An. 6; 43 An. 534.

J. F. Pierson Attorney for Defendant also appealing.

C. C. 2565 (2543) contemplates a real diminution of value in the thing sold in consequence of waste or deterioration caused by the acts or neglect of the buyer during the time of his possession. It is inapplicable to a general fall or depreciation of property. Bourgeat vs. Smith, Syndic, 16 La. 470.

The resolutory condition can be enforced only by the person or persons representing the whole price. One representing only a portion of the purchase price due can not restore the *status quo*, or resolve the sale. Swan vs. Gayle, 24 An. 501; Castle vs. Floyd, 38 An. 589, 593; Leflore vs. Carmors, 7 An. 67.

The resolutory condition implied in the contract of sale can not be enforced without restoring to the buyer the purchase notes outstanding and such portions of the purchase price as the buyer has paid on the property. This is a condition precedent. Walden vs. Bank, 2 Rob. 179; Lee vs. Taylor, 21 An. 514; George vs. Knox, 23 An. 355; Heirs of Castle vs. Floyd, 38 An. 587; Wilmot & Co. vs. Steamer Ouachita Belle, 32 An. 610; Heirs of Burney vs. Ludeling, 41 An. 632.

Where this exception is not specially pleaded in the lower court, or where it is so pleaded in the lower court but waived on appeal in the Supreme Court, the exception will not be made or sustained by the Supreme Court on the appeal. McKenzie vs. Bacon, 40 An. 167; Ware vs. Berlin, 43 An. 534.

The law is well settled, not only by the textual provisions of the code, but by repeated decisions of the Supreme Court, that in all cases of rescission, the party seeking relief must first offer to restore his adversary to the situation he was in before the contract. McDonald vs. Vaughan, 14 An. 728.

It is necessary to put defendant in default in order to render the resolutory condition available. Poydras vs. Turgeau, 14 La. 37.

The restoration or offer by the seller to restore the portion of the price paid by the buyer is a condition precedent to the seller's rights to claim damages, fruits or revenues from the buyer on account of the property, and this obligation by the seller can not be offset by claims for damages, fruits or revenues from the buyer. Until the seller returns the price paid he can not claim the property back nor any damages, fruits or revenues from the buyer on account of the property.

The opinion of the court was delivered by

MILLER, J. The plaintiff seeks to dissolve for non-payment of the price the sale of a plantation sold by him to the defendant. The terms on which the property was sold were: A cash payment, two notes of defendant for the credit portions of the sale, and the assumption by defendant of certain notes of plaintiff. At the date of the institution of this suit the plaintiff had received the cash payment; the defendant had also paid one of the notes and made payments on account of the others assumed by her. The price was eight thousand one hundred and twenty-one dollars. Defendant's payments are stated in the brief filed in her behalf at two thousand one hundred and one dollars; the plaintiff's brief makes the amount less, but the difference is unimportant. There were outstanding and unpaid, when the suit was brought, two notes held by plaintiff, amounting to two thousand four hundred and eighty dollars, excluding interest, and three thousand five hundred and forty dollars of notes assumed—all held by the American Freehold Mortgage Company of London, named in the act of sale in which defendant assumed payment of the notes. One of the outstanding notes held by plaintiff, and some of the outstanding notes held by the Loan Company, had matured when the suit was brought. The default on these matured notes was the basis of the suit. The petitioners claimed the dissolution of the sale; that defendant be condemned to pay for alleged depreciation and consumption of the personal property attached to the plantation at the time of the sale and for diminished value of the plantation, and besides judgment is asked against defendant for the fruits of the property since the sale.

The defendant filed various exceptions—among others, that there had been no tender by plaintiff of the part of the price paid by her, and that plaintiff, entitled to demand only part of the price still due, could not enforce the dissolving conditions. The exceptions overruled, the defendant, answering, combated plaintiff's demand for the dissolution of the sale, or the liability of defendant, in case the sale was dissolved, for the amount claimed in the petition. The case was tried by a jury, and there was verdict and judgment dissolving the sale, condemning the plaintiff to pay rent, and that plaintiff restore the price paid out for the improvements. Both plaintiff and defendant appeal.

The exception that plaintiff represents only part of the

price still due first engages attention. The dissolving condition accomplished in the contract of sale places the parties as they stood before the sale. The vendor takes back the property. The purchaser is restored the price he has paid, and is entitled to a complete discharge for any part of the price he has not paid. Can this last result *i. e.*, the discharge of the purchaser—be attained in this suit? If not, the action fails. Under the contract, the notes of the plaintiff given to the loan company were to be paid as part of the price, and for this payment the defendant became bound. Part of these notes are unpaid, and held by the company. The company does not join in this suit. It is made a defendant. Answering, the company disclaims interest in the controversy; avers the mortgage granted by plaintiff to secure its notes; recites the subsequent sale of the mortgaged property to defendant; alleges that, advised the defendant was to make the remaining payments on the notes, it notified both plaintiff and defendant of these payments as they matured; avers the company never formally accepted defendant as the debtor, and the answer closes with reserving all rights under the mortgage.

We notice the plaintiff's argument that the company never accepted the assumption by which defendant bound herself for the notes held by the company. But, as stated, the company gave defendant notice of the payments as they matured. That would avail as an acceptance. Besides such a stipulation may be accepted at any time, unless by some act of the creditor it is barred. If it had been intended by the company, by its answer in this suit, to discharge the defendant, it is to be presumed that purpose would have been expressed. But the answer, guarded in its terms, stops short of a discharge. It is therefore our conclusion that the defendant may be still held to the company on the assumption. The plaintiff, however, tenders a bond to secure the defendant against any demand of the company. If defendant is entitled to a discharge as an incident of the dissolution of the sale, she can not be required to accept in lieu of the discharge a bond of indemnity. The plaintiff representing only a part of the price remaining due, it follows in our opinion he can not enforce the dissolving condition which exact the release of defendant's liability for the whole price. See Civil Code, 2045, 2046; 7 An. 67; 38 An. 589.

We think the exception on the ground already discussed should

have been sustained. We have, however, read with interest the argument of defendant on another exception—*i. e.*, that to maintain this action the plaintiff was bound to tender to defendant the amount she had paid on account of the price. The plaintiff's answer is, that the liability of defendants for rents and revenues of the property since the sale compensates the debt of plaintiff for the price, and hence plaintiff is under no obligation to tender the price. But we think it fixed in our jurisprudence that altogether irrespective of defendant's liability in cases of this character for the revenues of the property, it is a prerequisite for maintaining the action that plaintiff shall tender the price paid by the purchaser. Until that tender plaintiff in such an action can invoke no relief. The precise contention of plaintiff that tender is not requisite because of defendant's liability for rents was held unavailing in one of the cases we cite in this connection. We think the exception on this ground was well taken. 23 An. 354; 14 An. 729; 43 An. 534; 21 An. 425.

The views expressed in the exceptions determine the controversy and render unnecessary any examination of the plaintiff's argument on other points

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that plaintiff's suit be dismissed with costs.

No. 11,503.

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STATE EX REL. ALGIERS BREWING COMPANY VS. FRED. D. KING, JUDGE OF DIVISION "B," CIVIL DISTRICT COURT, PARISH OF ORLEANS.

An order directing sale of the property of a corporation which is in the hands of a receiver may be suspensively appealed from by the corporation. on a bond sufficient to cover costs of appeal—the property being *in custodia legis* and under the control of an officer of court.

Any additional bond which the presiding judge may require as security for such damages as may accrue during the pendency of the appeal is not authorized by law, and can not be imposed as a condition precedent to the appellant's right to exercise his appeal.

APPLICATION for Writs of *Mandamus*, Prohibition and *Certiorari*.

Frank E. Rainold Attorney for Relator:

Two bonds can not be exacted of an applicant for an appeal.

The conditions of an appeal bond being fixed by law the court has no power or authority to add other and more onerous conditions. *A fortiori* it can not require a special bond to cover damages not covered by the appeal bond.

Where the judgment is not for a sum of money, nor for the delivery of property, movable or immovable, and the effect of appeal is merely to extend the administration of an officer of the court, a bond for costs is all that is required.

H. E. Upton and *Lazarus, Moore & Luce* Attorneys for Respondent:

On February 19, 1894, while the Algiers Brewing Company was in the hands of the receiver, the stockholders of the company held an alleged election and elected a new board of directors with new officers. This directory authorized and had taken a rule to rescind the appointment of the reciver, but that rule has never been tried or determined.

On March 1, 1894, the president of the said company, elected on February 19, 1894, applied, through counsel, for a suspensive appeal from the judgment ordering the sale of the property, alleging that the order worked the corporation irreparable injury, and that the defendant has moved to set aside the order of court appointing a receiver. In order to enable the respondent judge to wisely and prudently exercise the discretion vested in him, in fixing the amount necessary for the suspensive appeal bond, it was ordered that evidence be taken on a day fixed, all parties having notice thereof and all parties appearing at the time. After hearing the evidence then adduced and considering the matter the respondent judge granted the Algiers Brewing Company a suspensive appeal on their giving bond in the sum of one thousand dollars to cover costs, and a separate bond of thirty thousand dollars to cover the damages and injury which might be caused the various creditors or the company by a suspensive appeal. The appeal is then a suspensive appeal from the order of court decreeing that the property in the hands of the receiver appointed by the court be sold.

In this case the suspensive appeal sought will have the effect of restraining the sale which has been ordered by the court. The relator has not enjoined nor given any injunction bond. Surely he does not have the right to arrest a sale ordered by the court, especially as the sale was ordered after hearing the parties and considering the evidence adduced contradictorily, without giving a bond to cover the damages which may be occasioned by the arrest of the sale. A bond merely for costs would not cover such damage or injury.

There are authorities which sustain the position of the respondent judge that the bond which specially secures such damage is necessary and proper, and that, in his discretion, he has the right to require such a bond and fix its amount. The leading authority on the question is S. J. Hart vs. Judge, 34 An. 1210. In that case the court, after commenting upon the authorities in injunction cases and upon the general rule that a bond which would cover costs and damages would be sufficient, held that in exceptional and special cases an additional and larger bond could be legally required by the court. This case has been affirmed in 40 An. 843.

This same doctrine has been held by the court in injunction cases.

In State *ex rel.* Vial vs. Judge, 36 An. 910, the Supreme Court held that: "In computing the amount of the bond to be furnished for a suspensive appeal from a judgment dissolving an injunction with costs, the proper expenses incurred by the sheriff, as consequence of the injunction, for the preservation and cultivation of a sugar plantation under seizure, may be taxed as costs occasioned by the injunction, and must be included in the amount of the bond furnished to be required for such appeal."

The following are the salient and prominent facts and issues:

1. That considering the value of the property and the amount of the debts, the corporation is hopelessly insolvent.
2. That the testimony of the receiver and of all the witnesses discloses that it is impossible to secure any money with which to continue the operations of the brewery.
3. That unless such money is secured, the brewery will have to be closed in less than ninety days.
4. That if the brewery is closed and is no longer a going concern, a depreciation in its value of not less than thirty per cent. will be the result.

5. That the secured and mortgage bondholders are demanding the sale, and not a single creditor is objecting.
6. That the receivership indebtedness, by reason of the expenses exceeding the receipts, will increase.
7. That no one is opposing the sale except the insolvent, a nominal corporation, under a directory elected since the property was placed in the hands of a receiver.

E. Howard McCaleb, *B. McCloskey* and *H. P. Dart* for Intervenors on same side.

The opinion of the court was delivered by

WATKINS, J. This proceeding arises in the case entitled Lafayette Bank vs. Algiers Brewing Company, No. 39,952, in the Civil District Court, Division B, which court is presided over by the respondent judge, wherein several persons claiming to be bondholders of the defendant company intervened and procured rules on all parties to the suit, to show cause why the plant and all of the paraphernalia and property of said corporation should not be sold.

On the trial of said rules an order was made by the respondent to the effect that John H. O'Connor, receiver of the Algiers Brewing Company, should, after due advertisement, make sale at public auction of the entire property and effects of said corporation, for cash, for not less than two-thirds of its appraisement.

From this order of sale, the relator, acting through its president, moved the aforesaid court for a suspensive appeal, upon furnishing bond in the amount required by law, and the respondent fixed the amount of such bond at one thousand dollars, but at the same time requiring of the Brewing Company, as appellant, that it should furnish "and file, *before his appeal bond for costs*, * * * his bond, with a good and solvent surety for thirty thousand dollars, conditioned for the payment of all such damages as shall be sustained by the receiver and creditors by the appeal from the order of sale in this case, if it should be decided that such appeal was wrongfully obtained and illegally kept in force by the appellant."

In relator's petition are stated the grounds of complaint against the sale-order thus, viz.:

"Now your relator says that the judgment from which an appeal is sought is not a moneyed judgment, nor a judgment for the delivery of movables or immovables, and (the respondent) had no authority or right to demand, besides the appeal bond, the special bond hereinbefore spoken of."

He further shows that all the property and assets of the corporation are in the possession and under the control of the said receiver, an officer of the court, and if same suffer damage or deterioration, it will in nowise be his (relator's) fault; and he represents that when property is in the hands of an officer of the court, and there remains pending the appeal, a bond for costs, is all that can be legally demanded of an appellant.

In the alternative, he denies that the proof discloses the likelihood of any loss being sustained during the pendency of an appeal. And finally the relator avers that the action and order of the judge in requiring a special bond of thirty thousand dollars, if maintained, will practically operate a denial of its constitutional right of appeal, they superadding to an appeal bond a requirement that is illegal and contrary to law.

Hence his prayer is for *certiorari* to issue requiring the respondent to transmit to this court a certified copy of the record in said suit; for prohibition to restrain further proceedings in the matter of said sale; and *mandamus* to coerce a suspensive appeal on relator's one thousand dollar bond, which has been already tendered.

The respondent has sent up the original records of his court, in lieu of certified copies thereof, because of the delay which the making of certified copies would engender.

He returns, substantially, that, in view of the fact that he was unable, at the moment, to fully and definitely determine what the amount of the suspensive appeal bond should be—taking into consideration the injury which might possibly be wrought to all parties in interest by a suspension, for any length of time, of the order of sale, and, at the same time, be preservative of the relator's right of appeal—he made an order for the taking of testimony on that question, regarding such to be a conservative and proper course to be pursued, under the circumstances.

He further returns that, in his opinion, the testimony taken in pursuance of said order established the fact that great loss and injury would be entailed upon the corporation and its property by

the proposed appeal of the relator—a careful summary of the evidence adduced, and the reasons which influenced his judgment in the premises, being given at length.

He further returns "that, considering all these facts and circumstances, he considered it in the plain line of his duty, and in the exercise of a just and reasonable discretion, warranted by the settled jurisprudence of this State, to demand a bond equal to the amount of damage likely to result from a suspension of the order from which an appeal was sought," and hence he made the aforesaid order.

He insists that this was a proper case for the exercise of his discretion, and that such discretion was justly and reasonably exercised, and his action was warranted by the decisions of this court, and notably that in the case of State vs. Judge, 19 La. 167; State *ex rel.*, Coons vs. Judge, 27 An. 334; and in Hart vs. Judge, 34 An. 1210.

The controversy is thus narrowed to one question, and that is whether the relator is entitled to appeal suspensively from the order of sale upon its furnishing bond in the sum of one thousand dollars as fixed by the respondent's order; or was the right of appeal properly conditioned upon relator *previously* furnishing an additional bond for damages.

Relator furnished and caused to be filed the suspensive appeal bond of one thousand dollars, but declined to furnish the additional bond of thirty thousand dollars to cover such damages as may result during the pendency of the appeal.

The contention is, substantially, that under an *ex parte* order of the respondent at the request of plaintiff in the aforesaid suit a receiver was appointed, who qualified, gave bond and entered into possession of all the property and assets of the corporation; and is now, and has been at all times since said order was made in the actual possession, management and control thereof for the account of the creditors of the corporation. That certain of the creditors of the corporation having intervened in said suit, *but having obtained no judgment therein*, applied to the respondent *pendente lite* for an order for the sale of all its assets and property, as a conservatory measure, in the interest of all parties concerned.

That believing a sale would be injurious and result in irreparable injury and loss to the corporation, relator applied to the respondent for an order of suspensive appeal, which he granted under the suspensive condition above stated.

Of the imposition of this condition, relator complains that it is illegal and unwarranted in law; that the only judgment which the appellate court *could* render adverse to the corporation would be one affirming the validity and legality of the sale-order, directing the sale to be proceeded with; and, inasmuch as the property is in the hands of the receiver, an officer of court, and being operated by him for account of creditors, any loss which might happen during the pendency of the appeal could not be attributed to it—no part of the revenue passing under its control, and no part of the property being under its administration.

That the judgment, or interlocutory decree which is appealed from, is not a moneyed judgment nor one for the delivery of property, movable or immovable, and, consequently, the only bond that can be required is one that will cover the costs of the appeal, and that any other, or different bond which may be required, as an incident of the appeal, is without any warrant in law, and has the effect of a denial of its *exercise* of the right of appeal, notwithstanding its *right* to a suspensive appeal is conceded.

It is, therefore, a fact well recognized that the only *appeal* bond which the corporation was required to furnish was only one that would cover costs—the corporation having been divested of possession by the appointment of a receiver, and by his investiture of possession it became a stranger to the litigation *quoad* the order of sale, and relegated to the rights of a third person.

This statement would seem to close the controversy but for the reasons assigned by the respondent, which are persuasive, though unsound.

The only thing the respondent was called upon to determine was the amount of bond necessary for a suspensive appeal from the order of sale; and, in order to do that, he was only charged, under the law, to ascertain what amount would cover costs of appeal.

This the respondent did. He ascertained and fixed the amount of the bond for suspensive appeal, and the relator gave it.

Our predecessors stated the rule comprehensively and accurately in State *ex rel.* Durand vs. Judge, 30 An. 282.

"The right of appeal is a precious one," says the court, "and it should be favored and aided by the courts. There should be no difficulty in fixing the amount of the bond for an appeal in any case. When the judgment is for a specific sum, the *party cast* must give

bond for a suspensive appeal for a sum exceeding by one-half the amount for which the judgment was given. C. P., Art. 575.

"If the judgment decree the delivery of movable property of a perishable nature, the security for a suspensive appeal must be for an amount exceeding by one-half the estimated value of such movable. *Id.* 576.

"If the judgment decree the delivery of real estate not of a perishable nature, security shall only be required to an amount exceeding by one-half the estimative value of the revenue to be derived from such realty pending suit, and for such further amount as the judge may determine, as surety for any injury or deterioration which may be caused to the estate *by the appellant while in possession of the same.* *Id.* 577.

"In all cases not falling within the terms and provisions of these articles, *no other security is necessary than such as will suffice to cover the costs.*"

The suit of State *ex rel.* Block vs. Judge, 44 An. 564, presents a case of an intervenor demanding the right to suspensively appeal from a large money judgment which was awarded the plaintiff, against the defendant, sustaining an attachment, on furnishing a bond sufficient to cover costs. The district judge required a bond for one-half above the amount of the judgment, and this court made peremptory a *mandamus* of the intervenor, saying:

"The law fixes no standard for the amount of bond to be given by a party who wishes to take a suspensive appeal from a judgment refusing him a participation with others *in a fund in the hands of the court. A bond for cost* is sufficient," citing authorites. "The bond could only be for the satisfaction by the surety of the judgment to be rendered on appeal, should the principal fail to pay it. In no court could the relators be condemned, on appeal, to pay more than the costs. Requiring a bond for more would be *oppressive and an idle formality.*" (Our italics.) Succession of Edwards, 34 An. 216.

In Blanchin vs. Fashion, 10 An. 345, the principle is stated clearly.

"The expressions of the article (C. P. 575)," say the court, "imply that the judgment to necessitate a bond in one-half exceeding its amount must be one which the appellant has been condemned to pay. This amount of bond does not, therefore, seem applicable to the case of a judgment when the party appellant is condemned to pay *nothing.* Accordingly a bond for costs only was held to be suffi-

cient for a suspensive appeal in an action of partition when the fund *to be divided was in the hands of the court.*"

In the case of State *ex rel.* Eustis vs. Judge, 27 An. 685, the court said very tersely: "*As appellant is not in possession of the funds in controversy, he need only give bond for the amount of costs.* 10 An. 345; 20 An. 108. As he did this within ten days, the appeal operated a *supersedeas.* C. P. 575."

In State *ex rel.* Hickey vs. Judge, 20 An. 108, it was substantially held that where there is no standard specially fixed by law, as to the amount of the appeal bond required to operate a *supersedeas*, pending an appeal, the judge should allow a suspensive appeal on appellant giving bond in an amount sufficient to cover costs. State *ex rel.* Sharp vs. Judge, 22 An. 176; State *ex rel.* Garrison vs. Judge, 21 An. 43.

In Heath vs. Vaught, 16 La. 515, the court put the proposition thus:

"The fund out of which all of the claims were to be paid *was in court*; it is therefore only necessary to inquire what judgment the court can render to determine the sufficiency of the bond. If the appeal shall be successful, then Heath & Co. are not liable for anything; if they are unsuccessful, they are only liable for costs. The bond is very ample to cover them."

In State *ex rel.* Picot vs. Judge, 27 An. 231, it was held that, inasmuch as the property belonged to a succession, and was in the custody of the court, a suspensive appeal could be taken on the appellant furnishing a bond for costs. State *ex rel.* Beebe vs. Judge, 23 An. 31.

To the foregoing authorities, others of like purport might be added *ad infinitem*, but others are not deemed necessary. The tenor and purport of them all is that when the matter, fund or property in dispute is not in possession of the appellant, and he is not the party condemned by the judgment that is appealed from, but the *res* is in the hands or custody of the court, appellant is entitled to suspend proceedings under such decree, on furnishing a bond that will cover costs.

The cases cited and relied upon by the respondent are not pertinent to the question before the court.

State *ex rel.* Coons vs. Judge, 27 An. 334, involved the case of a relator claiming the right to a suspensive appeal on a bond for costs

in an injunction suit in which he sought to restrain the sale of a valuable steamboat, and in which he claimed a large money judgment against the defendant—the effect of the appeal being to perpetuate his injunction. His mandamus was refused.

In Hart vs. Judge, 34 An. 1210, the relator was likewise a plaintiff in an injunction suit which had been dissolved, and he sought to obtain a suspensive appeal on a bond for costs, but this court required relator to file an additional *injunction bond*—not appeal bond—to cover such damages as "*shall have been sustained by the injunction heretofore obtained*;" not for the purpose of covering possible damages which might result from the appeal.

State vs. Judge, 19 La. 167, presents a somewhat similar question of injunction, and like decision.

In State *ex rel.* Cain vs. Judge, 40 An. 841, relator was plaintiff in an injunction suit restraining the defendant from exercising the functions of an office he claimed, and, from an adverse judgment, he asserted the right to appeal, suspensively, on furnishing a bond for costs; and to this effect the *mandamus* was made peremptory.

In State *ex rel.* Vial vs. Judge, 36 An. 910, another case is stated of an injunction dissolved, the only controverted question being the *quantum* of costs, a question not involved in this case.

After having gone over this case very thoroughly and made a careful examination and analysis of authority on the question involved, we have arrived at a conclusion different from the one entertained by our learned brother of the District Court.

Waiving any expression of opinion as to the *right* of appeal in this class of cases—a question not presented for decision—our conclusion is that the relator can not be required to furnish bond to cover damages that may accrue during the pendency of an appeal; and, thus concluding, it is ordered, adjudged and decreed that the writs prayed for be made peremptory.

No. 11,462.

MARTHA A. ASHLEY VS. ELISE SCHMALINSKI ET AL.

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The law will not maintain a contract, the consent to which of one of the parties is the result of error as to the substance of the contract, the error being caused by artifices and fraudulent representations of the other party; or if the frauds, not his directly, have been participated in or made effective by him. Civil Code, Arts. 1847, 1848; 1 Story's Equity, Secs. 189, 191, 192, 193, 195.

When the party seeking relief on grounds of fraud against an alleged unconscientious contract of exchange (has employed an agent on whose information respecting the property) the subject of the exchange the party depended, the fact of the employment of that agent, and that the contract has been executed on the faith of his information, will furnish no defence to the defendant, the other party to the contract, if by his acts and conduct he furnished the motive for the agent not to give his principal information actually withheld by the agent, and which, if given, would have prevented the execution of the contract, and thus protected the principal.

APPEAL from the Tenth District Court, Parish of Rapides.
Andrews, J.

W. H. Jack, H. H. White and *M. H. Carver* Attorneys for Plaintiff and Appellant:

Plaintiff sues to annul and set aside a certain act of conveyance and for damages.

The gist of the complaint is that the defendants, Schmalinski, Strouss and Loomer, conspiring and colluding together for that purpose and to that end, did, by false and fraudulent representations and other artifices, mislead, deceive and defraud plaintiff as to the quantity, quality, character, situation and value of the property given in exchange for her property. That she actually received but four thousand and four and twenty-hundredths acres of these lands, when under the agreement she was to have received the entire body of lands owned by Mrs. Schmalinski on the south side of Red river, aggregating over five thousand acres, and that the diminished quantity so received by her is worthless and unsalable and wholly different in nature, quality, situation and value from what it was represented to be.

In all cases (and more especially in sales) where the information which would have destroyed the error has been withheld by the other party to the contract, it comes under the head of fraud and vitiates the contract. C. C., Arts. 1832, 1847.

Fraud vitiates everything, and whatever protean shape it may assume justice is left free to meet and thwart it. Lazarus vs. McQuirk, 42 An. 201; McReady & Burke vs. Schencke, 43 An. 479. Fraud as applied to contracts is the cause of an error bearing on a material part of the contract created or continued by artifice with design to obtain some unjust advantage to the one party or to cause a loss or inconvenience to the other; the error must be

on a material part of the contract, that is to say such part as may be reasonably presumed to have influenced the party in making it, but it needs not to be on the principal cause of the contract, as it must be in case of simple error without artifice. C. C., Art. 1847.

The word artifice, as here employed, means not only "an assertion of what is false or a suppression of what is true," but is expressly extended to any and all means in themselves "calculated to produce a belief of what is false or an ignorance or disbelief of what is true." Silence on the part of one whose duty it is to speak is oftentimes the most unmistakable evidence of fraudulent intent, and is fully compassed by this definition of the code. C. C., Arts. 1847, 1832. Story's Eq., pp. 201, 202; 13 Wall. 379; 37 An. 558; 5 An. 491; 33 An. 1364; 5 M. 306; 6 An. 426; 43 An. 964; 10 R. 5; 12 An. 369; 3 An. 379; 18 How. 230; 3 Cr. 264.

It confessedly appearing from the answer of defendant Schmalinski that she treated with defendant Strouss as special agent of the plaintiff in the negotiations culminating in the alleged act of exchange without any communication whatever with the plaintiff, and it further appearing by her act of sale to Strouss (made part of plaintiff's petition) that she on the same day deeded to the latter one thousand and seventy and thirty-hundredths acres of the same lands in consideration "of his services to her in effecting this exchange" with his own principal, it follows as a fact and in law that such an act was a corrupt circumvention of plaintiff and in effect bribery.

Aside from the secrecy attending this transaction, the absence of all knowledge of it by the plaintiff, the conveyance to Strouss is so self-condemnatory as to leave no doubt as to the conspiracy and fraud.

In the broad glare of such turpitude it would be equally idle to contend that any acts or representations made by this unfaithful agent would bind his principal or could in any way advance the cause of her who was *particeps criminis* in the unlawful act. The betrayal of his trust for a reward, *eo instanti*, put an end to his agency, and nothing he may have said and nothing he may have done can bind anybody but himself and the beneficiary of his traitorous act. The rules of agency bring no benefit to those who openly and flagrantly violate them for their own gain.

White & Thornton Attorneys for Defendants and Appellees:

There is absolutely no evidence tending to show that either the defendant or her husband was party to any fraud or conspiracy by which the plaintiff was induced to make the exchange complained of.

Error as to the value of property purchased is not error of fact, but error of judgment; and the law furnishes no relief for an error of judgment. Citizens Bank of Louisiana vs. Clarence L. James, 26 An. 264.

Even fraudulent misrepresentations are not sufficient to annul a contract where the complaining party investigated the matter, or failed to do so when it could have been done. Kent's Commentaries, 7th Ed., Vol. II, p. 609; *Ibid.*, p. 618, and note A at bottom of page; *Ibid.*, pp. 622, 623; *Ibid.*, p. 625; Story's Eq. Jur., 3d Ed., Sec. 194; *Ibid.*, Secs. 149, 148, 197, 200 A; Domat's Civil Law, Cushing's Ed., p. 240, Secs. 406, 407; Revised Civil Code, Art. 2521; *Ibid.*, Art. 1847, pars. 3 and 9; 1 An. 389; 3 An. 4; 33 An. 1364; 13 Wall. 379.

As contracts of exchange can not be rescinded on account of lesion (R. C. C. Art. 1863), it follows that without proof of fraudulent conspiracy on the part of the defendant and further proof that the property acquired by the plaintiff is less valuable than that which she gave, she can neither annul the exchange nor compel the defendant to pay any damages.

The evidence fails to show that the property acquired by the plaintiff through the act of exchange is less valuable than the property which she parted with. She has therefore suffered no damages.

Even if the plaintiff could prove conspiracy and lesion, the contract can not be annulled, because an innocent third person has acquired a mortgage on the property given by plaintiff, and the *status quo* can not be restored.

As to this mortgage creditor, made defendant herein, the evidence utterly fails to prove fraudulent collusion.

The opinion of the court was delivered by

MILLER, J. The plaintiff, Martha A. Ashley, wife of W. H. Jack, brings this suit to set aside for fraud an exchange of her property in

the town of Alexandria, for certain lands in the parish of Rapides, of Elise Schmalinski, wife of Samuel Schmalinski. Besides Schmalinski and wife, the plaintiff joins as defendants Adolph Strouss and H. M. Loomer, charged to have been accomplices in the fraud, and B. Ehrstein, to whom Schmalinski and wife mortgaged the property conveyed to them in the exchange, the petition denying that Ehrstein is a *bona fide* holder, for value, of the mortgage note. The fraud alleged is, substantially, that the exchange of the plaintiff's property was procured by false and fraudulent representations and artifices of Strouss and Loomer, as to the character and value of the lands of Schmalinski and wife; that these lands were practically of no value, and plaintiff's dwelling was worth eight thousand dollars; that, beyond this, the plaintiff was defrauded of a large portion of the lands by a corrupt agreement between Strouss and Schmalinski, and that the lands so acquired by Strouss were all that possessed any value; and plaintiff charges that Strouss and Loomer being instruments of Schmalinski and wife, they all participated in the alleged fraudulent representations and artifices. The relief asked is the annulling of the exchange; that the transfer of plaintiff's property by Schmalinski and wife be enjoined; the mortgage to Ehrstein be set aside; that plaintiff recover certain taxes on the Schmalinski lands, and other expenses incident to the exchange, paid by plaintiff; and, finally, she asks for exemplary damages. Defendants answered, denying all allegations of fraud. The judgment of the lower court was against Strouss and Loomer for damages, and against plaintiff, maintaining the exchange and the mortgage. Plaintiff appeals.

The act sought to be set aside, of exchange of plaintiff's property for the Schmalinski lands, is of date the 30th January, 1892, and recites that each party gives her property for the other. The valuation of plaintiff's dwelling is fixed higher than the lands, the difference being adjusted by the stipulation that plaintiff should retain her dwelling for a few months after the date of the act.

The testimony shows that plaintiff, desirous of selling her dwelling in Alexandria, employed Strouss, one of the defendants, a real estate agent, to effect the sale. About the same time Loomer and the defendant were employed by Schmalinski and wife to sell their lands in the parish south of Red river. Of Loomer's employment by Schmalinski and wife, plaintiff was ignorant. Strouss conceived

the scheme of the exchange of the dwelling for the lands. He urged it on plaintiff, and represented the lands were heavily timbered and saleable, lay in a solid body, and were five or six thousand acres in extent. Strouss enforced his fascinating statement by suggesting the employment of Loomer to examine and report as to the lands.

Loomer, if not then, soon after became the partner of Strouss, and the commissions on the exchange thereafter effected of plaintiff's dwelling were shared between Loomer and Strouss. The plaintiff, entirely ignorant on the subject, stated she would have to rely on the information given her, and the result was, Loomer proceeded on his mission of examination. His account to plaintiff on his return was even more favorable than that of Strouss. Loomer's report was in substance, that the lands were heavily timbered with white oak and other trees of value, lay convenient to the railroad in a solid body; that the timber could be readily sold at good prices: when cleared the lands were adapted to farming purposes—worth ten dollars per acre, could readily be disposed of, and he and Strouss concurred in the assurance that she should get all the lands. Loomer emphasized his account by the statement that the lands were high and free from overflow. True, the testimony of these representations comes from plaintiff. We have weighed the circumstance of her interest, and of the contradiction her testimony encounters from that of Strouss and Loomer. Her narration, clear, consistent and positive, finds corroboration, we think, in other parts of the record. As to the contradiction of Loomer and Strouss, their parts in the transactions connected with the litigation, we think, give little, if any, weight to their statements. Our conclusion is the representations were made as detailed by plaintiff. Our conclusion is, also, the representations were false, and designedly false. There is some testimony tending to show a speculative value of the lands, based on the hope of a perfect levee system and other possibilities of the future. On the other hand there is testimony far more persuasive, that under any conditions the cost of reclaiming the lands places that result beyond rational probability. As to the timber, it is put beyond dispute that there is practically, no growth on the lands of the kinds represented to plaintiff. The lands are shown to be low, swampy and overflowed; of course, utterly unfit for cultivation, or capable of being fitted for cultiva-

tion, except at a cost none could incur. It is shown, too, that they do not lie in a solid body, nor, for the greater portion at least, convenient to the railroad. This testimony, falsifying in all material respects the representations on the faith of which plaintiff was induced to exchange her dwelling for the lands, comes from surveyors and others qualified to speak, and creates the absolute conviction of the error caused by the false representations under which plaintiff acted.

The judgment of the lower court decrees that Strouss and Loomer pay damages, and thus condemns their conduct but holds there is no basis to disturb the exchange. We have given the most careful attention to the case exhibited with respect to Schmalinski and wife, and reach a conclusion different from that of the lower court. It is in evidence that on Loomer's visit of inspection of the lands he was accompanied by Baker, who gave his testimony as a witness. Baker was asked by Strouss to examine the lands, and at his instance went with Loomer. On Baker's return he gave Strouss the true condition of these lands, and that conformed to the testimony produced by plaintiff. Bad as the lands were reported by Baker, Strouss testifies he "colored" it, and made it, as he expresses it, as "blue" as possible. Thus the false report of the lands was given to plaintiff by Loomer to induce her to make the exchange, and the true report exhibiting the worthless character of the lands was placed before Schmalinski. Srouss practically directed both reports. When Baker's report was put before Schmalinski it elicited from him the comment, "he did not think the lands were as bad as that," but he was stimulated to no action or forbearance with respect to the exchange into which the plaintiff was being led by the false report then before her. But the record shows that in this condition, the true report before Schmalinski and the false report before plaintiff, at Strouss' request Schmalinski made him a gift of one thousand acres of the land, consummated by the conveyance a day or two after, the conveyance reciting Strouss' services in effecting the exchange as the motive for the gift. The general rule, as claimed by counsel for defendant, is that the law requires the parties to the contract of sale, to inform themselves as to the property, and does not exact disclosures from one to the other (Story's Equity, Sec. 200). This principle of law supposes equal opportunities of information, but is never applied to sustain unconscientious advantage.

There was here no such equality of positions. The full knowledge of the character of the lands, if not possessed before, and at all times, was certainly imparted to Schmalinski by Baker's report. It was given to Schmalinski and withheld from plaintiff by the treachery of the agent on whom she implicitly relied for information. If a line of that report had reached her the lands would have been utterly rejected as an exchange for her dwelling. With the full knowledge on the subject afforded Schmalinski by Baker's report withheld from plaintiff, to whom it should have been furnished by Strouss, and if furnished would have protected her against the sacrifice of her property, in our opinion, it is unconscientious to permit Schmalinski to profit by the exchange. Then, too, he knew he was dealing with Strouss as an agent for the plaintiff. The gift to that agent, and the purpose and nature of his communications, was notice, we think, by necessary implication, of the violation of the duty of the agent to his principal. With notice of this treachery of the agent and with abundant reasons at least, for Schmalinski to suspect the fraud shown by the record practised on the plaintiff by the agent to bring about this exchange, we can not distinguish the position of Schmalinski from that of one who had actual knowledge of the fraud, and of course no one with this knowledge could profit by the exchange. In this view we think Schmalinski is affected with responsibility for the false representations and artifices of Strouss and Loomer, which led plaintiff to give her dwelling for the lands.

There is another view. In her conferences with Strouss, it was the plaintiff's understanding she was to receive all the Schmalinski lands south of Red river, in all five thousand or six thousand acres. It was afterward falsely represented to her that there were only four thousand acres. This was in aid of the gift of the one thousand acres, Strouss proposed to secure for himself. A paper was prepared, reciting that Schmalinski bound himself to convey four thousand acres for the plaintiff's dwelling. Schmalinski signed it, and, as we gather from Strouss' testimony, in that condition was submitted to plaintiff and assented to by her. There is some discrepancy in the briefs whether plaintiff ever saw the paper; but the point is not of importance. It is quite certain, she acted on the belief in the representation that four thousand acres was the extent of Schmalinski's ownership. But when Baker's report was

laid before Schmalinski, with the menace of the defeat of the exchange if the report became known to plaintiff, " with some persuasion " Strouss testifies Schmalinski was induced to agree to sell four thousand eight hundred acres, and four thousand in the paper was changed to four thousand eight hundred, and this change was without plaintiff's knowledge or consent. If the paper had been submitted to plaintiff, and this alteration was after the submission, that circumstance would certainly not put the transactions in a better light. Now, if Schmalinski was willing to part with four thousand eight hundred acres instead of four thousand for the plaintiff's dwelling, the plaintiff should have been the recipient, not Strouss, who had assured her that she should get all the lands. The effect of the transaction was to deprive plaintiff of a large portion of that she had been assured she was to get. It was a fraud on the part of Strouss. Was not the transaction of a nature to suggest the fraud to any one? The alteration of a paper affecting another's interest without his knowledge, is out of the usual course. Strouss testifies, the altered paper was that signed by Schmalinski, but it appears it was shown to her. Another paper to same purport, Strouss testifies, was signed by her. Both read that four thousand acres of the land were to be conveyed for her dwelling. And her assent to either or both was procured on the faith of the false representation that Schmalinski owned only four thousand acres. Both papers, it is testified, recited the conveyance of the lands was to be to Strouss, but announced were to be in exchange for plaintiff's dwelling. The relation of plaintiff as principal, who was to receive the land, and Strouss as her agent, was plain and known to Schmalinski. Strouss again testifies when the deeds, one to plaintiff and the other to her agent, were prepared, and before her signature, Schmalinski stated he thought plaintiff was to get all the land. But Strouss answered it was all agreed with plaintiff and it made no difference if Schmalinski got her dwelling. We think Schmalinski's remark in this connection indicated his appreciation all was not right, and he should have adhered to his thought and not yielded to Strouss' assurance. The result of Schmalinski's acquiescence was to contribute to the fraud of plaintiff's agent, and under circumstances from which the fraud should have been inferred. Then, too, the gift of the lands to Strouss, in direct connection with Baker's report of their condition, implied Strouss was not to submit that report to his principal. It was his duty to give

plaintiff the information of the true conditions of the lands. The gift impliedly exacted the pledge that duty should not be fulfilled. Strouss conformed to the pledge and Schmalinski got the dwelling. The tendency and effect of the gift was to close the mouth of Strouss in respect to the communications duty required he should make to his principal. Schmalinski in this view can not urge that plaintiff has no claim to relief because she had an agent. The agent was in effect controlled by the gift of Schmalinski, and not by duty. In this view, too, we think Schmalinski is not free from responsibility for the success of the false representations under which plaintiff parted with her property.

The grounds we have announced dispose of the case, involving in the main questions of fact; we might have simply announced our conclusions, but that would not have been consistent with the right of the litigant to know the grounds of decision. There are phases of the litigation on which we have not touched, because not necessary. The case is presented by defendants in this court without reference to any questions of the admissibility of the testimony. We have endeavored to give the requisite attention to all parts of the voluminous record, and to weigh with care the argument of the defence, and if there are points of that argument not discussed in the opinion it is not because they have escaped our attention, but that the case is dominated by the views we have expressed. The controversy, in our opinion, does not at all involve the question of the value of plaintiff's dwelling. Hence, we have excluded from consideration the testimony and discussion on that point. The issue is whether the lands were of the character represented. The effect of the alleged deficiency and non-warranty in respect to property given in exchange, is a question not free from difficulty, but not necessary to be considered. There is a question raised whether the deed to Strouss of the one thousand acres is in issue, plaintiff contending she asked no relief on that ground. We think the issue is substantially made in plaintiff's last supplemental petition; the general issue was enough in the answer on this, and, for that matter, perhaps, on all points. Besides, the evidence on that point is in the record. We take occasion to say that, in our opinion, the insertion of the non-warranty clause affords no room for any comment, with respect to counsel, if, indeed, any unfavorable comment was intended.

The law will not hold a party bound when his consent is the result of error bearing on the substance of the contract, caused by fraudulent representations of the other party to the contract, or if not made directly by the other party, yet, by his act and conduct, he has contributed to make effective the false representations. In our opinion, plaintiff, in respect to the wrong of which she complains and the relief she seeks, is within this principle of law and the articles of the code. C. C., Art. 1847, 1848; 1 Story's Equity Jur., Secs. 189, 191, 192-195.

As to the mortgage of Ehrstein, in our opinion, there is no basis to disturb it. We shall endeavor to secure plaintiff against that mortgage.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, in so far as it dismisses plaintiff's demands against Elise Schmalinski and husband, be avoided and reversed; that the exchange of plaintiff's property for the lands of said Elise Schmalinski, by act of date 30th January, 1892, before Hooe, notary, be and it is hereby annulled, and the parties to said act are hereby reinstated in the ownership, the plaintiff of her dwelling and said Elise Schmalinski of her land, as that ownership existed before said act; that plaintiff do have and recover from said Elise Schmalinski and husband two hundred dollars, taxes paid on said lands, with interest from date of payment; that Samuel Schmalinski and wife do surrender to plaintiff, within twenty days from the filing of the mandate in the lower court, the note made by them of date the 10th of May, 1892, and secured by mortgage on plaintiff's dwelling, or, in default thereof, that plaintiff do have and recover from said Samuel Schmalinski and wife one thousand dollars, with interest from 1st of January, 1893, the amount due on said note; that, in other respects, the judgment of the lower court be affirmed and that defendants pay costs in both courts.

No. 11,483.

L. L. AUSTIN VS. T. J. WILLIAMS, JR.

J. E. HEWITT, INTERVENOR AND THIRD OPPONENT.

A third opponent, contesting the rank of plaintiff's privilege, as well as the *bona fides* of his claim, must stand or fall by his allegations. Reserving the benefit of a suit against the defendant, he had previously filed, prevents his taking

anything, by way of opposition, that he seeks advantage of in such pending suit. Third opposition in one court can not be used or employed as an accessory of another suit in a different court.

APPEAL from the Ninth District Court, Parish of Red River. *Hall, J.*

J. F. Pierson and *C. W. Elam* Attorneys for Defendant and Appellant:

To entitle a creditor to intervene in the suit of another creditor of the common debtor it is necessary that such intervenor have a direct interest in the result of the suit by such other creditor, and the intervenor must be confined to his own interest therein.

Such a creditor can not intervene in the suit of another creditor against the common debtor for the purpose of obtaining in his own favor a separate judgment against the common debtor. Lincoln vs. New Orleans Express Company, 45 An. 729; 44 An. 843.

Where such a creditor, prior to his intervention in the suit of another creditor, has brought a separate suit against the common debtor, he will not be permitted, on intervening in the suit of another creditor against the common debtor, to disintegrate the issues involved in his own suit, and try such issues piecemeal in his intervention.

Where the cause of action is not stated in the petition with sufficient precision, and the effect has been to surprise the defendant and prevent him from setting up the proper defence, the case will be remanded with leave to amend. Gremillion vs. Bonaventure, 4 An. 60.

The decision of questions which turn on the construction of the petition, on which the rights of a litigant depend, ought not to irrevocably conclude such litigant in cases where the party and his counsel may well be misled. Barrett vs. Zacharie, 2 An. 656.

Where plaintiff demanded a jury trial, without putting up the jury fee, the case was placed on the jury docket, but not stricken from the non-jury docket; the defendant attended court till the judge announced there would be no jury the following week. The defendant failed to attend that week, and the plaintiff took judgment against him on the non-jury docket, when defendant had material testimony in his favor to offer. *Held:* The defendant

is entitled to a new trial, though the case should not have been placed on the jury docket. Lanier vs. Shuler, 13 S. W. 614; 77 Tex. 24.

From the adoption of our C. P. it has been the settled construction of Arts. 389, 390 that the interest required to authorize an intervention must be direct and closely connected with the object in dispute, founded on some right, claim or lien either conventional or legal, and that ordinary personal creditors of a defendant have no right to interfere with the administration of justice between him and other individual creditors who are pursuing their claim in the ordinary mode of legal procedure. Brown vs. Saul, 4 N. S. 434; Pierre vs. Marr, 7 N. S. 196.

The opinion of the court was delivered by

WATKINS, J. The original suit was instituted by plaintiff on a claim of six hundred dollars for services rendered the defendant as overseer on his Elmwood plantation in the parish of Red River for and during the year 1893, and falling due on the first of December of that year. Averring a special lien and privilege upon the crops grown on said plantation during that year, and his fear and belief that the defendant would part with or remove same, he obtained a sequestration thereof.

Soon after the aforesaid sequestration the intervenor appeared and filed opposition in the sequestration suit, the purport of which is that he had filed a suit on the 12th of December, 1893, against same defendant in the District Court of the parish of De Soto, wherein he claimed judgment for the sum of eight thousand six hundred and fifty-three dollars and forty-one cents, and in which he had procured the sequestration of certain property of the defendant, consisting of corn, cotton and cotton seed, which suit and seizure are referred to and made parts of his said opposition.

That in said court he also obtained an attachment of the defendant's property in said suit, situated in the parish of DeSoto, "and which your petitioner hereby affirms and in no way abandons." The opponent further represents that said sum of money was advanced by him to the defendant to enable him to make and gather his crops on the aforesaid plantation in the parish of Red River during the year 1893, and to secure which he has a lien and privilege on said crops as the furnisher of necessary plantation supplies.

He further represents that the plaintiff's suit was brought at the instance and through the procurement of the defendant, and that his property was sequestered with his consent, averring that the plaintiff was not indebted to the defendant, at the time, in any amount.

His prayer is for judgment against the defendant, enforcing his lien and privilege on the defendant's crop of 1893, and rejecting the demands of the plaintiff altogether, and especially his demand for a lien and privilege.

The plaintiff excepted to the petition of intervention, on the ground that it disclosed no cause of action and no interest in the subject matter of his suit, which opponent seeks to protect or defend, and therefore his opposition should be dismissed.

In the alternative of said exceptions being overruled, the plaintiff answers and avers that third opponent has not intervened in good faith, but that the purpose and object thereof is to hinder and delay him in recovering a judgment against the defendant with a recognition of privilege on his crops. He further avers that, by virtue of third opponent's having judicially made claim to a priority of privilege on the crops of the defendant and respondent, he has estopped himself from disputing the debt and privilege he asserts against the defendant, and hence the opposition should be dismissed.

The defendant, in answer to the third opposition, denies all and singular the allegations therein contained, and especially denies the allegations of fraud and collusion therein charged.

His answer to plaintiff's demand is a general denial. On these issues the case was tried and the following judgment rendered, to-wit:

First: In favor of the plaintiff against the defendant for the sum of five hundred and eighty-six dollars, recognizing and enforcing his lien and privilege as overseer on all the crops by the defendant produced on his Elmwood plantation, in the parish of Red River, in 1893, condemning same to be seized and sold.

Second: In favor of third opponent as against the defendant, "recognizing and enforcing his lien and privilege as furnisher of necessary plantation supplies, to the extent of seven thousand one hundred and thirty-five dollars, on all the crops made and raised by (the defendant) during the year 1893."

Third: That as between the plaintiff and the intervenor, the former is entitled to preference on the proceeds of sale.

From that judgment the defendant, alone, appealed, after making an unavailing effort to obtain a new trial. In this court neither the plaintiff nor the opponent has made any appearance, by counsel or brief, and neither has answered the appeal.

In this court defendant's counsel makes complaint of the second paragraph of the judgment alone, thus acquiescing in other portions of the decree.

The question for decision is, whether third opponent was entitled to recover a judgment against the defendant, "recognizing and enforcing his lien and privilege as furnisher of necessary plantation supplies, to the extent of seven thousand one hundred and thirty-five dollars, on all the crops made and raised (by him) during the year 1893;" or should it have been restricted to the question of fraud on the part of the plaintiff and defendant in the institution of this suit, and that of the relative rank of the respective privileges of the plaintiff and third opponent.

The defendant's contention is, that third opponent's right to judgment is confined to the last two propositions, and that the second paragraph of the judgment is *ultra petitionem*, and was a complete surprise to him, from the effect of which he is entitled to relief at our hands.

From the foregoing synopsis of the petition of third opposition, it appears that his complaint is, that at the time plaintiff filed suit, and sequestered the defendant's crops on his plantation in *Red River* parish, nothing was due him, and that the suit and sequestration were the result of a fraudulent combination between the plaintiff and defendant.

It is apparent that the object to be attained thereby was the defeat of plaintiff's seizure of defendant's crops, on which opponent claimed a superior, or ranking lien and privilege, and against which he had obtained writs of sequestration and attachment in his suit in De Soto parish, though he had not, at the time, procured a seizure thereunder.

Third opponent's effort was, undeniably, to forestall the plaintiff's seizure, and secure control of the defendant's crops, in such manner as to render his suit and writs in the parish of De Soto, effective.

The opening averment of his opposition proves this, for it makes specific reference to the De Soto suit, stating its date, amount claimed, the writs therein issued, and the relief prayed for, and is

concluded by the statement, "and which (suit) your petitioner hereby affirms, and in no way abandons."

The further averment in reference to the lien and privilege is adjuvatory of the allegation previously quoted in regard to the De Soo suit, to which it must be held to refer. His prayer for judgment against the defendant for the recognition and enforcement of his lien on the crops of 1893 must be taken in connection with the immediately following request, that the demands of the plaintiff be rejected, and especially his demand for a lien and privilege—the two being correlative parts of the same relief—each having reference to the principal object to be attained by the suit, the control of defendant's crops.

It must be observed that the third opponent demanded no writ, and obtained no seizure under his opposition. The assertion of his rank and priority over the claim and privilege of the plaintiff, as well as his charge of fraud against the plaintiff and defendant, are admissions of plaintiff's dominion and control of the *res*, rendering his opposition necessary.

We think third opponent's demand, properly construed, restricts his right to judgment to the question of fraud and rank of privilege, and that he was entitled to no other judgment or relief. Reserving, as he does in his petition, all of his rights and claims in the De Soto suit against the defendant, the third opponent must resort to that jurisdiction for the ascertainment and determination of same.

His third opposition in the Red River court can not be employed as an aid or auxiliary of his suit in the De Soto court against same defendant.

We are of opinion that the contention of the defendant is correct, and that the judgment appealed from should be amended and affirmed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be so amended as to eliminate therefrom that portion which recognizes the lien and privilege of third opponent for necessary plantation supplies furnished to the defendant to the extent of seven thousand one hundred and thirty-five dollars on all the crops made and raised by him during the year 1893, and that as thus amended same be affirmed, costs of appeal to be taxed against third opponent as appellee.

No. 11,456.

R. B. HOLLINGSWORTH VS. ATKINS BROTHERS.

The unsworn declaration of a partner reduced to writing some time after the transfer (the partner testified in the case and said nothing of additional interest included in the transfer) will not be admitted in evidence, to add to or to explain the terms and conditions of the contract of lease transferred.

On the dissolution of a provisional seizure for informality the plaintiff owes actual damages caused by the wrongful issue of the writ.

The citation was addressed to the defendant partnership.

It was served on one of the partners, as if the partnership was a commercial partnership. It was not a commercial partnership *quoad* the lease to them of immovable property.

One of the partners bonded the property (provisionally seized) in the name of the partnership and received and disposed of the property in the name of the partnership.

The partnership is no longer in a position, legally, to invoke the want of citation of one of the partners.

The real property leased to a commercial partnership creates *quoad* that property a joint and not an obligation *in solido*.

The transfer of a lease without stipulation does not carry with it other rights than those stated in the contract.

The testimony to prove the number of acres leased is conflicting. The weight of the testimony supports the jury's verdict.

The lessor must bear the expense of extraordinary repairs rendered necessary by an overflow.

The inundation of the land was not unprecedented and gives no cause for reduction on rent account.

Proof fails to establish an amount of assessment for taxes reduced, of which the defendant claims the benefit.

APPEAL from the Ninth District Court, Parish of Red River. *Hall, J.*

J. C. Egan for Plaintiff and Appellant:

The objection to citation in a suit commenced by conservatory process is waived by bonding the property. Cross on Pleadings, p. 165, Sec. 170; Bush vs. Dewing, 24 An. 272.

The bonding of property attached was giving an effect at least equal to an appearance curing a defective citation or absolute want of citation. Williams *et al.* vs. Gilkerson-Schloss Commission Company, 45 An. 1013.

The map of a surveyor made from an *ex parte* survey may be received in evidence as a memorandum from which he can testify.

The unsworn interpretation of a written transfer, made several years previous, which interpretation was made, written and signed

several years after the transfer, is not admissible in evidence, when the party who signed it is present and sworn as a witness.

Commercial partners are bound *in solido* for the debts of the partnership. C. C. 2873.

They (particular partners), in order to entitle them to the protection of this rule of law (that is, not to be bound by the acts of particular partners), must not do, or consent to nor suffer anything to be done, which may hold them out to the world as general partners; and it would always be prudent and proper to give public notice to the community that the partnership is special and of the particular species or traffic to which it is confined. Smith on Mercantile Law, p. 73.

If the partners are privy and silent and permit him to go on dealing in this way without giving notice, the question will be whether subsequent approbation is not equivalent to previous consent. Story on Partnership, note p. 212.

A debtor can not repudiate a contract of which he retains the fruits. 36 An. 259.

Though a partnership engaged strictly and solely in the business of farming by raising the products of the farm has no occasion to draw bills of exchange, and one partner can not bind the rest by such bills, it is otherwise when the firm is engaged in conducting a saw-mill and buying and selling lumber. In such cases the firm is properly a trading partnership, and can bind each other by drawing bills of exchange. 22 Howard U. S. Rep. 265.

Damages for the wrongful issuance of a writ of provisional seizure will not be allowed when the seizing creditors acted without malice and when the circumstances are such as to give probable cause for the seizure. 6 An. 402.

The substitution of the new lessee to the old one and the discharge of the latter is a novation. 14 An. 344; C. C. 2185, 2189.

The tenant of a predial estate can not claim an abatement of the rent under the plea that during the lease either the whole or a part of the crop has been destroyed by accident unless these accidents be of such an extraordinary nature that they could not be foreseen by either of the parties at the time of the contract, such as the ravages of war extending over a country then at peace and when no one entertained any apprehension of being exposed to invasion or the like. But in these cases the loss suffered must

be equal to one-half the value of the crop at least to entitle the tenant to an abatement of the rent. C. C. 2743.

An overflow on the Mississippi river is not an unforeseen event, and does not entitle the tenant to an abatement of the rent.

The periodical overflow of a river is not an extraordinary accident, and if a party seeks to give to an inundation that character he must show that it was unusual, unforeseen, and one to which the country is not ordinarily subjected. Vinson vs. Graves, 16 An. 162.

21 An. 535, in which it was decided where a plantation on Red river was overflowed that it was not an unforeseen accident, and affirms Vinson vs. Graves; also Jackson vs. Michael & Murdock, 33 An. 728.

Overflows in the past history of this State have been frequent occurrences, and they are therefore not of such an extraordinary nature that they could not have been foreseen. J. N. Payne, Jr., vs. James & Trager; 45 An. 381.

Pugh & Wilkinson Attorneys for Defendant and Appellee:

Citation is necessary to each member of an ordinary partnership. Process served on one member will not bring the partnership into court, and the judgment against the partner not cited is an absolute nullity. LeBlanc *et al.* vs. Marsoudet, 25 An. 464.

In a purchase of real estate by a commercial partnership, the same becomes the joint property of the partners, and, by parity of reasoning, in a lease of real estate by a commercial partnership, the same becomes the joint property of the partnership. Thomas vs. Scott, 3 R. 356; May *et al.* vs. Railroad Co., 44 An. 444.

When one member of an ordinary partnership appears and bonds the property provisionally seized, such does not cure the want of citation on the other partner not cited. Love vs. Dickson, 7 N. S. 161.

A contract of lease for a term of five years is an entity, and any over-payment for one year inures to the benefit of subsequent years.

If in the lease of a predial estate the premises have been stated to be of a greater extent than they in reality are, the lessee may claim an abatement of rent. C. C., Art. 2701.

When a loss deed is made the basis of a defence, its loss need not be advertised before it is admissible to introduce parol proof of its contents. The same is true of an administrator's bond, and for the same reason the notes of a surveyor, shown to be correct, need not be advertised as lost before introducing parol evidence of contents. Gordon vs. Penn *et al.*, 26 An. 367; Cox vs. Bradley, 15 An. 529.

On a plantation that had not overflowed as late as June since 1866, an overflow at that season of the year must be considered as unusual, unforeseen, and one to which the country was not ordinarily subjected. It is only the periodical overflow of the waters of a river that is not an extraordinary event. C. C., Art. 2743; Vinson vs. Graves, 16 An. 162.

Repairs and reconstructions rendered necessary by an overflow must be borne by the lessor. C. C. 2716-17-18, 2693-94; Payne vs. James *et al.*, 45 An. 381.

One who secures a reduction of his taxes on leased property of fifty per cent., on the condition that he will grant a reduction of rent to his lessee to the same extent, can not, after obtaining and enjoying the reduction of his taxes, refuse to comply with the condition on which it was granted. Kenner vs. Holliday, 19 La. 154; C. P. 35; C. C. 1890, 1902.

Attorney's fees are allowable on the dissolution of a writ of provisional seizure, as well as other actual damages. Fernandez & Co. vs. Miller, 26 An. 120; Barrimon vs. McFeely, 32 An. 1179.

The opinion of the court was delivered by

BREAUX, J. Plaintiff claims rent as lessor of a plantation on Red river known as the "Jordan Ferry" plantation.

The defendants held as transferees of Smith Bros. for the years 1891 to 1894.

For the year 1892, the defendants, after they had became transferees of the lease, executed two notes, one for the sum of two thousand and thirty-two dollars and sixty-six cents due November 1, 1892, and the other for five hundred and eighty-eight dollars due on the 30th of that month.

Prior to their maturity, the plaintiff instituted suit on these two notes and caused a writ of provisional seizure to issue.

The defendants moved to dissolve this writ of provisional seizure on two grounds.

1. That the writ issued without cause.

2. That the affidavit to the petition for the writ was made by the attorney when the plaintiff was present.

The first ground was overruled; the second was pronounced fatal to the writ; the provisional seizure was dissolved for the reason that it is only in the absence of the principal that the attorney can make the affidavit.

Atkins Bros., the defendants, obtained a release of a portion of the property seized, by executing a forthcoming bond on the 11th day of October, 1892.

A second forthcoming bond was executed on the 17th day of October and all the property under seizure was released.

Plaintiff amended his original petition and procured another writ of provisional seizure and caused the seizure of the property on which he claimed a privilege.

On the 10th day of January, 1893, the defendants executed a forthcoming bond and obtained its release from the second provisional seizure made.

Subsequently, one of the partners interposed an exception on the ground that he had not been cited.

The exception was overruled.

The defendants answered.

The case was tried by jury.

The verdict was for plaintiff against the defendants *in solido* for the sum of one thousand four hundred and seventy dollars.

After an ineffectual attempt to obtain a new trial, the plaintiff appeals.

BILL OF EXCEPTIONS.

The defendants on trial attempted to prove their right to any over-payment made of rent for the year 1890 by those from whom they leased.

To that end they offered to prove that in the transfer of the lease to them by Smith Bros. the latter intended to convey their right to claim any over-payment of rent on account of any deficiency of acreage in the year before stated.

The paper offered to prove intention was signed by a member of the firm of Smith Bros. some time after the suit at bar had been instituted.

This member of the firm had testified as a witness in the case, and said nothing about this transfer.

The court *a qua* held that, if he was to give an interpretation to the transfer different from what it showed on its face, he should give it under oath, and not by written statement.

No rule sanctions the method adopted to prove the intention of the contracting parties.

If the act needed interpretation in order to include all the rights transferred, the writing offered, being unsworn to and *ex parte*, was not admissible, for it could add nothing to the legal rights of the parties.

The ruling was correct and the document properly excluded.

The amended petition for a provisional seizure, and the second seizure made, leaves but little to discuss in matter of the dissolution of the original writ, save the damages claimed to be due because of its illegality.

ALLEGED WANT OF CITATION.

One of the defendants pleads and argues that he was not cited; that the partnership of which he was a member was not a commercial partnership, and that the service of the citation addressed to the partnership does not cure the want of citation on the partner not cited.

The defendants having, in the name of the partnership, applied to the court to bond the property, and having executed a forthcoming bond in favor of the sheriff and taken possession of the property, have cured any defect of citation, or the absolute want of citation.

Be the partnership commercial or ordinary, the fact remains that the bond was executed in the name of the partnership, to whom the property seized was delivered.

A partnership can not repudiate a bond whereby it has obtained the possession of property.

The records do not disclose that it was the act of one of the partners, as argued, but that it was the act of the partnership.

There was an appearance made in the case, by the act of bonding. It was the condition precedent to obtaining release of the property on a forthcoming bond.

Such was the ruling in a number of cases of this court. The first case being Rathbone & Co. vs. Ship London, 6 An. 439; Bush & Thompson vs. Darring, 24 An. 272; Williams vs. Gilkerson-Sloss Commission Company, 45 An. 1013.

AN ORDINARY PARTNERSHIP.

The lease of real estate by a commercial partnership will not have the effect of binding the partners *in solido*.

The lease and the purchase of real estate are not different, in so far as relates to the extent of the ownership of the partners of an ordinary partnership. The real property bought by a commercial partnership is the joint property of the individual partners.

The same rule will apply to a lease.

The articles of the code limit commercial partnership to the purchase of any personal property and its sale; to carrying personal property for hire in ships or other vessels. C. C. 228.

In interpreting the provisions of the law relating to commercial partnerships this court has decided that the purchase of real estate is foreign to the purpose of a commercial partnership.

The reasoning which leads to this conclusion and establishes its correctness applies with equal force to the contract of lease.

The immovable property leased by a commercial partnership is held by the partaership for the purposes of the firm under conditions similar to those attending the ownership of immovable property, and ordinarily the obligations of the partners are joint.

It occurs that in the case at bar the responsibility of the lessors is not materially lessened by this joint liability.

All the property provisionally siezed was subject to the lessor's privilege.

The right is not limited by the joint responsibilty, for the lessor's privilege covers the whole property.

Even the property of third person is subject to that privilege when it is found on the property leased.

A partner whose obligation is only joint and who has furnished a release bond, to pay the judgment should he be condemned, must be held bound to an amount equal to his obligation on the bond.

Thus bound it must be of little moment to him whether the obligation is joint or *in solido*.

Moreover the judgment appealed from condemns the defendants *in solido* to pay the amount pronounced due.

The jury returned that the defendants were liable *in solido*.

Neither of the defendants has answered the appeal and prayed for the amendment of the judgment.

The judgment as to them must remain. C. P. 889.

To the amount of the judgment the question of solidarity is finally determined.

In reference to the balance due it is secured to the limit of the obligation on the bond of release.

ACRES OF LAND LEASED.

The defendants claim in their reconventional demand a deduction for twenty-eight and three-fourths acres, alleged shortage in the number of acres for the years 1890, 1891 and 1892, at four dollars and fifty cents an acre, and a deduction for a shortage of thirty-one acres for the year 1890 at five dollars an acre.

The jury, in making up their verdict, erroneously included overpayments by Smith Brothers, transferrors of the lease to the defendants, though the court had excluded testimony offered to prove that claim.

A lease transferred will not include a right to amounts overpaid by the transferrors at the date of the transfer, unless it is expressly declared that the right is transferred with the lease.

It is a right distinct from those under the lease and not carried with the transfer of the lease without some statement to that effect.

The defendants not having been subrogated to the right, it remained with those who paid the amount without having received consideration therefor.

The right of a purchaser of a lease (without qualification), for its unexpired term, commences from the date of purchase. Walker & McVean vs. Dohan, 39 An. 745.

The over-payments made by the defendants themselves were for-lease of lands for 1891 and 1892, and we are now to determine whether they should be deducted as claimed.

Regarding this area, it is proved that in February, 1892, the plaintiff and one of the defendants, for the purpose of fixing the amount of the rent notes that were executed by the defendants to the order of plaintiff, the lessor, agreed that there were four hundred and twenty-eight and three-fourths acres of land contained in the tracts leased.

Subsequently, the defendants had the lands surveyed, in order to establish the number of acres they had leased from the plaintiff.

The land was leased subject to measurement.

The surveyor, after his survey, fixed the number of acres at four hundred and seven acres and informed the defendants that that was the entire area of the leased lands. The plaintiff was not notified of the survey.

After the suit had been instituted, the plaintiff employed the same surveyor as the one that defendant had previously employed; the survey was made *ex parte*. No notice whatever was given to the defendant.

The last survey shows an increased area of twenty-eight and three-fourths acres.

We gather from the conflict of testimony that in the last survey a less number of acres was deducted as uncultivable than was deducted in the first survey.

There are sloughs and other places not cultivable in the fields, also skirt lands not cleared for cultivation.

The jury determined that the first survey was correct.

The difference is not great. It is a question purely of fact. The evidence is conflicting. The principle is laid down and generally received as correct, that where there is no decided preponderance of evidence on either side, the case depending mainly upon the conflicting testimony of the parties themselves who are equally respectable and unimpeached, the jury are the proper persons to decide between them as to whose testimony is entitled to the greatest credit and the verdict ought not for this cause to be disturbed. Proffat on Jury Trials.

There is in the case at bar a preponderance of testimony in support of the verdict. The surveyor himself does not depose that his first survey, considered correct by the jury, was incorrect. A verdict is entitled to the regard of an appellate court on questions of fact.

The overflow. The next item claimed in defendants' reconvention is for repairs and reconstructions on the land leased.

The testimony shows that more than two hundred and fifty dollars were expended.

During more than a month in 1892 the place was covered by water several feet in depth.

The fences, the houses and cisterns were greatly damaged and partly destroyed. Extraordinary repairs were necessary.

Subsequently these expenses were incurred by the defendant.

These improvements consisted of reconstructions and repairs not in the line of the ordinary.

They were permanent and added value to the place. The plaintiff must bear the expense of extraordinary repairs rendered necessary by an overflow.

Alleged unprecedented overflow. The defendants claim that in consequence of an unusual, extraordinary and unforeseen overflow they were able to grow only about twenty-five or thirty per cent. of a crop after the waters subsided and to that per cent. he asks that the rent price be reduced.

The testimony does not support defendants' contention.

Inundations of these lands were not unprecedented. Witnesses deposed that they were entirely under water during several floods in preceding years. The intervals between the overflows were not of such number of years as to afford reasons to exclude all apprehension upon the subject. The accident was not of such an extraordinary nature that it could not be foreseen, and therefore it would not justify a reduction of the rent.

The lands are on a navigable stream, which periodically overflows its banks in that section of the State.

It has never been decided by this court that the lease of lands thus exposed is subject, in effect, to the "high water clause" without stipulating that condition.

The following decisions control the case on this point: Vinson vs. Graves, 16 An. 162; Massur vs. Murray, 21 An. 535; Jackson vs. Michael & Murdock, 33 An. 728; Payne vs. James & Trager, 45 An. 381, and Art. 2743 of the Civil Code.

The defendants, in the order of their defence, next claim that the police jury having passed an ordinance, by which they reduced the assessments on all overflowed lands fifty per cent., provided that in cases of lessors they allowed a corresponding reduction in the rental; they are entitled to the bounty offered to the unfortunate land owners and lessees who were the victims of the overflow of 1892.

The records disclose that there was a reduction of the assessment made of defendant's property.

The amount of the whole assessment is not proved, nor is it established, with sufficient particularity, that reduction was made which should enure to the benefit of plaintiff's lessor.

There was an attempt made to complete the proof regarding this reduction.

Upon objection, the testimony was excluded and no bill was reserved.

DISSOLUTION OF THE FIRST WRIT.

The plaintiffs are entitled to damages, in a limited amount, for the wrongful suing out of the first writ of provisional seizure.

The evidence satisfies us that one hundred and fifty dollars is a reasonable amount. This includes the fees of attorneys and other expenses incurred in a defence, on motion to dissolve, which resulted in a dissolution of the writ.

Though the lessor has the right to detain the property on the leased premises until the rent is paid, and the removal of it gives just cause for the writ, the law requires compliance with its terms, and if dissolved because of informality, the defendant is entitled to damages to which he has been subjected. Fleetwood vs. Dwight, 8 An. 482.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by increasing the principal of the judgment against defendants from one thousand four hundred and seventy dollars, principal, to two thousand six hundred and twenty and sixty-six-one-hundredths dollars, with five per cent. interest on two thousand and thirty-two and sixty-six-one-hundredths dollars from November 21, 1892, and five per cent. interest on five hundred and eighty-eight dollars from November 30, 1892, subject to the following credits, viz.: Thirty dollars, an admitted error of calculation; one hundred and thirty dollars, over-payment on acreage of lands leased; two hundred and fifty dollars, for extraordinary repairs; one hundred and fifty dollars, damages caused by the illegal provisional seizure; that the defendants are bound *in solido* to the amount of one thousand four hundred and seventy dollars, and interest thereon, and jointly for the remainder due; that plaintiff's provisional seizure be sustained and his lessor's lien and privilege recognized on all the property seized, until payment of the whole amount of the rent, and that same be enforced on the whole of the property seized to the whole amount of this judgment, interest and costs.

As amended, the judgment is affirmed at appellee's costs.

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No. 11,378.

THE EAST LOUISIANA RAILROAD COMPANY VS. THE CITY OF NEW ORLEANS.

Sec. 34 of Art. 135 of 1888 applies to street railways operated within the corporate limits of the city of New Orleans.

The City Council of New Orleans has the power to refuse the grant of a right of way through the streets of the city to a railroad operated beyond the city limits. It can also demand a price for the privilege, and it can also, if it deems the exercise of the power reasonable and proper, grant the right of way to a railroad operating their lines beyond the city into other territory, without compensation in money, but for other considerations.

In such a case, if the grant is accepted, it is irrevocable, except for a violation of their terms.

APPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

Farrar, Jonas & Kruttschnitt Attorneys for Plaintiff and Appellee:

The city of New Orleans had ample legislative authority to grant the plaintiff the right of way in question. Section 8 of Act No. 20 of 1882, paragraph 18; Art. 243, Constitution of 1879; Sec. 689, Revised Statutes; Duplessis vs. Brown, 14 An. 842.

The plaintiff does not operate a street railroad, and the grant does not cover such a franchise; hence, the Act 135 of 1888, requiring street railway franchises to be sold at auction, does not apply. Booth's Street Railway Law, Sec. 1.

The grant having been lawfully and unconditionally made, and thus accepted and acted upon, is an executed contract, and is protected from impairment by the Constitution of the United States. It can not be withdrawn or onerously modified without plaintiff's assent. Booth's Street Railway Law, Sec. 40; City vs. Telephone Company, 40 An. 41; St. Louis vs. Telephone Company, 148 U. S. 103.

E. A. O'Sullivan, City Atttorney, for Defendant and Appellant:

The plaintiff in this case was bound to know that under the laws in force when Ordinance 6139 was passed that street railroad franchises could not be granted except at public auction, and to the highest bidder.

He was bound to know that he could not acquire this valuable franchise without paying the city for it, and he was bound to know that all laws which permit the transfer of these franchises without advertising for what consideration parties desire to give had been abrogated by the act of 1888, and that, therefore, his title to the same was null and void.

Act 135 of 1888, Sec. 4, provides: "That said council shall not have power to grant, renew or sell or to dispose of any street railroad franchise except after at least three months' publication of the terms and specifications of said franchise, and after the same has been adjudicated to the highest bidder by the comptroller, as provided in Sec. 21 of the City Charter."

Chas. Louque, Attorney at Law, as *amicus curiæ*, submitted a brief.

The opinion of the court was delivered by

McENERY, J. The plaintiff company has its domicile in the parish of St. Tammany, and operates a railroad from Pearl River Station, on the line of the New Orleans & Northeastern Railroad Company, to Covington, in said parish, and a branch to Mandeville, and has thirty-six miles of road in active use.

The charter of the company confers the power upon the directors to extend the road to points in Mississippi and Louisiana.

By an arrangement with the Northeastern Railroad Company, it runs its trains over that road to the city of New Orleans, at its terminus on Press street.

To facilitate its business in the transportation of freight and passengers, and for the convenience of its patrons, it obtained from the City Council of New Orleans, by Ordinance 6139, the privilege to construct and operate a railroad with steam power from a point on the Northeastern Railroad, where it intersects Edinburg avenue, through said avenue to Bayou St. John, across said bayou to the road-bed of the Spanish Fort Railroad, and over said road-bed to the corner of Canal and Basin streets.

No price was paid for this grant, and the consideration alleged is the convenience of the citizens of New Orleans, in giving them better access to the trains of the plaintiff company, which at present are some distance from the centre of the city.

The plaintiff company accepted the grant and proceeded to comply with it, and expended some three thousand dollars in work, and in anticipation of its benefits constructed the Mandeville branch.

No price having been paid for the grant, the City Council, believing it to be null and void, repealed the ordinance granting it. Hence this suit, to have declared null and void the repealing ordinance.

The action of the City Council was based on the provisions of Sec. 34 of Act 135 of 1888. This section of the act manifestly applies only to street railway franchises, granted for the purpose of operating a road exclusively within the city limits. It does not apply to railroads carrying the mails and transporting freight and passengers long distances beyond the limits of the city. The Legislature never intended, and in the nature of things such intention would be impractical in execution, to cause railroads coming into the city from a distance to have the franchises of the right of way sold at stated times to the highest bidder. The act is limited in its application, when it says that the City Council shall have no power * * * "to sell or dispose of any street railroad franchise except after, at least, three months' publication of the terms and specifications of said franchise, and after the same has been adjudicated to the highest bidder by the comptroller, as provided in Section 21 of the city charter." No latitude of construction could make the provisions of this section of the Act 135 of 1888 extend to other than roads which are operated exclusively within the corporate limits.

The fact that the plaintiff's road reaches the city over another road does not change its character into a street railway. Its attempt to reach the road over which in part it runs its trains is a matter of convenience. Its destination is still beyond the city limits, and practically it is a continuous line of road from the city to its objective point—Covington. If it ran its trains only from its intersection with the Northeastern Railroad within city limits, and carried passengers and freight between these points, it would be classed as a street railway and come within the purview of Sec. 4 of Act 135 of 1888.

But this is not a fact. The object of the plaintiff company is to carry freight and passengers on its own cars beyond the city limits to Pear River Station, when they will reach their own road-bed. As the road of plaintiffs is not a street railway, the City Council had the

power to grant the franchise without requiring a compliance with Act 135 of 1838. Art. 243 of the Constitution.

The consent of the city is only necessary to grant the privilege of a right of way to a railroad running beyond the city's limits. See 689 R. S.

Having granted the franchise to plaintiffs and it having been accepted the contract was perfected. New Orleans vs. Telephone and Telegraph Co. 40 An. 41.

In the case of City of New Orleans vs. Telephone and Telegraph Co., 40 An. 41, this court said:

"Obviously upon the clearest consideration of law and justice, the grant of authority to defendant when accepted and acted upon became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well recognized doctrine of the authorities since the Dartmouth College case. 4 Wheat. 518."

The city of New Orleans can as a matter of right refuse to grant the authority for a passage through its streets of a railroad. It can also demand a price for the privilege. But it can also, as a matter of right, if it deems the exercise of the power reasonable and proper, grant the right of way to a railroad extending its lines into other territory without a compensation in money, but for other considerations.

In the instant case the council has granted to a railroad company a right of way through certain streets for the purpose of operating its road beyond the limits of the city. The grant has been accepted, and except for a violation of its terms it is irrevocable.

Judgment affirmed.

No. 11,364.

ANTONIO AUGUSTI VS. CITIZENS BANK OF LOUISIANA.

No sales, whether judicial, forced or voluntary, of property mortgaged to the Citizens Bank can affect its rights secured by the 24th section of its charter.

But as to taxes, it must be presumed that the Legislature did not intend to deprive the State of any prerogative, right or property, unless in terms expressive or inference irresistible.

The property of the mortgage stockholders was always subject to taxation, and the remedy to compel payment remains unimpaired by the charter.

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The law does not contemplate that the assessor shall test titles in order to make assessment of the property.

A *prima facie* title suffered to remain unquestioned on the official records, taken in good faith as a basis for the assessment, is a compliance with the requisition of the statute regarding assessments.

APPEAL from the Civil District Court for the Parish of Orleans. *Théard, J.*

Farrar, Jonas & Kruttschnitt Attorneys for Plaintiff and Appellee:

Any person who pays the taxes levied on an assessment in a given name is estopped from afterward alleging that such assessment is invalid. Read vs. Creditors, 39 An. 125; Factors and Traders Insurance Company vs. Levi, 42 An. 435.

Under Art. 329 of the Code of Practice replications are prohibited in Louisiana and therefore all allegations in the answer are open to every objection of law and of fact, such as nonage, coverture, fraud, prescription and the like, as if specially pleaded. If the defendant be surprised the proper remedy is a continuance or a new trial. Planters' Bank vs. Allard, 8 New Series, 141; Hennen's Digest, p. 1155.

A tax deed, even though made pursuant to a sale under a void assessment, is nevertheless *prima facie* valid, and an assessment in the name of a purchaser under that deed, or of any one holding under him, and in whose name the property stands on the conveyance records, is a valid assessment and vests a perfect title in one purchasing under it. State *ex rel.* Maspereau vs. Batt, 40 An. 582; Palmer vs. Board of Assessors, 42 An. 1127; Prescott vs. Payne, 44 An. 655, 656.

The provision in the charter of the Citizens Bank of Louisiana, that the property mortgaged to said bank may be seized and sold at any time, in whosesoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession by succession or descent to heirs or legatees, by last will and testament, or otherwise, in the same manner as if the same were in the possession of the original mortgagor, is nothing more than a statutory *pact de non alienando*, and does not affect the rights of creditors holding a privilege on the property, and especially the right of the State to recover her taxes out of the same.

The charter of the bank does not affect the rights of the State to collect her taxes on the property mortgaged to the bank, for the additional reason that the sovereign is never included in general words of a statute. Endlich on Interpretation of Statutes, Sec. 161; Sutherland on Statutory Construction, Sec. 133.

Henry Denis Attorney for Defendant and Appellant:

The assessment in the name of one only, of two joint proprietors, when the property is held in indivision, and is recorded in the several names of the joint proprietors in the office of conveyances, is null and void *in toto*. The tax sale made under such assessment is absolutely null. Norris *et al.* vs. Hays *et al.*, 44 An. 912; Kearne vs. Collins, 40 An. 209.

When the tax sale is an absolute nullity, the adjudicatee acquires no title and can not transfer any; and, therefore, at a subsequent tax sale, the second adjudicatee, having to trace his title through the first, acquires no right either. Gibson vs. Hitchcock *et al.*, 37 An. 209.

Estoppel must be specially pleaded. Heirs of Wood vs. Nicholls, 33 An. 728.

Under the charter of the Citizens Bank of Louisiana, a tax sale of property mortgaged to the bank, and securing the bonds of the State, can not affect the mortgage, any more than any other forced sale. The purchaser takes the property *cum onere*. Charter, Sec. 24; Bertoli vs. Citizens Bank, 1 An. 120; Citizens Bank vs. Buisson, 7 Rob. 507; 17 La. 387; 11 Rob. 209; 2 An. 526, 606; 28 An. 771.

All the provisions of the charter of the Citizens Bank enter into the contract between the State and the bondholders, as fully as if specifically stipulated in a notarial act. Louisiana vs. Pilsbury, 15 Otto, 288.

The opinion of the court was delivered by

BREAUX, J. The record discloses that on the 16th day of July, 1836, Honoré and Alexander Coulon mortgaged the lot and improvements thereon, claimed in this suit, to the Citizens Bank to secure the payment of stock debt of seven thousand dollars.

This mortgage was foreclosed in 1890 and the property was adjudicated to the defendant.

The plaintiff was the adjudicatee of the property at tax collector's sales for State taxes of 1887. The assessment was made in the name of Joaquin Sambola.

The latter acquired the property by authentic deed, duly recorded, in May 1885, from J. B. Henry, Jr.

Henry became the owner at tax sale made for taxes of the year 1883 under an assessment in the name of the estate of Alexander Coulon. The property was assessed for the taxes for years 1870 to 1885 in the name of the estate of Alexander Coulon, for the years 1886, 1887 and 1888 in the name of J. J. Sambola, and for years subsequent in the name of plaintiff, Augusti.

The State taxes for the years 1871, 1872, 1874 and 1875 were paid by the defendant, the Citizens Bank.

The testimony shows that there is a large amount unpaid of bonds issued under the law of 1836, amendatory of the charter of the bank. These bonds it is urged by defendant have such a guarantee from the State that the State can not in consequence lessen the security by selling for taxes property mortgaged for their security. The plaintiff alleges that the Citizens Bank has slandered and continues to slander his title and disturb him in the enjoyment of his ownership of the property.

The prayer of his petition is for an injunction restraining the bank from interfering with the petitioner or his tenants and from asserting that it is the owner of the property, and that plaintiff be quieted in the enjoyment of his possession.

In the answer the defendant pleads a general denial and specifically sets forth that plaintiff has no title to the property; that the property was not assessed in the name of the owners in 1883.

That the tax sale of 1885 was an absolute nullity—the adjudicatee, Henry, acquired no title and could not transfer any; that in consequence the second adjudicatee having to trace his title to the first acquired no title, as the true owner had never been divested.

In the alternative, the defendant's argument through counsel is that, if the tax sale be valid, it would not under the provisions of the charter of the Citizens Bank affect her mortgage upon the property for the reason that all mortgages executed for stock or loans may be closed at any time in whosesoever hands or possession the property

mortgage may be, notwithstanding any alienation or change of possession. See Sec. 24 of Citizens Bank, Act of 1833.

The first question which presents itself for our determination is, if the sale is not void, what effect must be given to the non-alienation clauses of the bank's charter?

The second question is, is the tax title to the property based upon the tax sale for the taxes of 1887 a valid title?

This court has expressed its recognition of the binding force of the section of the Citizens Bank's charter cited, and stated with some emphasis that no sale, whether judicial, forced or voluntary, of property mortgaged to the Citizens Bank, can in any manner affect the rights secured to that institution by the 24th section of its charter; that the Legislature intended no exception and made none. Bertoli vs. Citizens Bank, 1 An. 120.

In the different cases to which our attention is directed the interests were private and the suits related to the disposition of the property sought by persons seeking to realize rights which they had acquired subsequently to the bank's mortgage.

In those cases the rights involved were passed upon as if the property was in the possession of the original mortagor.

The question at issue in the case at bar is different.

The Constitution ordains that all property shall be taxed in proportion to its value.

While this provision does not extend to or include public property of the general government, of the State, or any of its subordinate subdivisions, or property specially exempted, it extends to and includes all property in commerce.

The State is not the owner of the property taxed.

The property of the mortgage stockholders was always subject to taxation and the remedy to compel payment remained unimpaired by the charter.

The taxes attach primarily to the lands and remain until satisfied by payment or from the proceeds of the sale for their payment.

Nothing in the charter prevents a tax sale of the property of a mortgage shareholder.

There exists a presumption against the legislative intent to affect government.

Unless sovereignty is expressly embraced by the terms of the

statute, it does not come within the terms of law regulating rights among persons.

The rights of the State to collect her taxes should not be treated as relinquished or conveyed away by inference.

The liability of the original stockholder to pay his taxes does not become ineffective from the moment the bank proceeds to foreclose its mortgage.

This exceptional right, in opposition to the State, can not be created by legal construction.

"It is presumed that the Legislature does not intend to deprive the crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms or makes the inference irresistible." Endlich on the Interpretation of Statutes, p. 223.

There is no direct expression in the statute upon the subject and there is nothing in its terms which makes the inference irresistible.

The tax sale. The validity of the tax sale involved in the case at bar, must be determined irrespective of the charter.

It is made the duty of an assessor, by statute, to examine the records of the conveyance office to ascertain what taxable property there is in his district or parish.

The record of deeds of conveyance and of mortgage are taken as the basis of the assessment.

It does not devolve upon him to test the validity of these acts in order that he may ascertain in whose name to assess the property.

If an act be not radically null upon its face, he is within the law in taking as correct a recorded deed interested parties have for years permitted to remain on the record as an adverse title, unquestioned and unassailed.

There was a notarial deed of record dating from 1885.

It devolved upon the owner annually to make a return of the property, a required formality uncomplied with.

He knew that the property had not been assessed in his name.

The notarial record in the conveyance office was a notice that title was recorded in the name of the person to whom it was assessed; the owner has no legal cause of complaint of the sale of the property for the taxes.

Two years prior to the registry of the notarial act of sale to Sambola, in whose name it was assessed when the last adjudication, that

of 1887, was made for taxes, the property was adjudicated to Henry, who was Sambola's author.

The objection is directed against this tax sale, *i. e.* the tax sale to Henry in 1883, null, it is urged, because assessed in the name of the estate of Alex. Coulon, it being at the time the property of the estate of Honorè and Alexander Coulon.

Defendant's counsel forcibly argues in support of the proposition that the defect in the tax sale of 1885 is fundamental and not curable by monition.

Be that as it may it does not follow that the tax sale of 1888, pleaded in the case at bar, is also null.

The deed itself is *prima facie* evidence of a compliance with the requisition of the law.

The deed was evidence of title.

When the party claiming adversely shows that a prerequisite to the validity of the title has not been complied with, the *prima facie* is destroyed, the presumption defeated and the deed becomes entirely useless as a title.

The defendant, a mortgage creditor, having a direct interest, possibly more valuable than that of the owners themselves, suffered the *prima facie* evidence to remain unquestioned.

The property passed into other hands under this title.

The ministerial officers performed every duty imposed by law. The assessment was made by reference to the deed of record, and every other condition essential to the character of the deed was complied with. It therefore became conclusive evidence of title.

The tax deed generally is an original title, not derivative, and can not be defeated by a missing link in the chain of title.

Titles that are intrinsically null, if permitted to remain unquestioned, may become the basis of an assessment that will result in a valid sale.

Any other ruling upon this point would compel the assessors to investigate titles and ascertain as to their conclusive validity. This was never contemplated by the law. The evidence of a *prima facie* title is the requirement.

Such evidence was of record when the assessment was made of the property sold at tax sale in 1888.

The judgment appealed from is therefore affirmed at appellants' costs.

Mr. Justice Miller recused.

No. 11,350.

CLARENCE COCHRAN VS. MRS. AGNES COCHRAN, WIDOW OF FRANK K. MOORE.

The plaintiff claimed one-ninth in his grandfather's succession after having settled his interest in the property of his grandmother.

The title to the property was in the name of the grandmother, though it belonged to the community between the grandmother and grandfather. But it was inventoried as her property and in the compromise the whole of it was treated as property belonging to her succession.

Having compromised on the basis that the property belonged to her succession, the heir is without right to recover a second time part of the same property as coming to him from his grandfather's estate.

The defendant had made reasonable search for the lost document.

The foundation required had been laid. Secondary evidence to prove its contents was admissible.

APPEAL from the Civil District Court, Parish of Orleans.
King, J.

Gus A. Breaux Attorney for Plaintiff and Appellant:

Secondary and parol evidence should not be admitted where an original act of compromise pleaded by a party is shown to have been in his possession, and its loss or absence is not fully accounted for. Baines vs. Higgins, 2 La. 222; Lockhart vs. Jones, 9 Rob. 386; Ticknor vs. Calhoun, 29 An. 278; C. C. 2279, 2280.

Where the contents of the original document are to be proved by parol, much stronger proof of the loss will be required. Lavergne vs. Elkins, 17 La. 220.

Transactions regulate only the differences which appear clearly to be comprehended in them. C. C., Art. 3073; Perret vs. Hill, 1 Rob. 310; Journal du Palais, Jur. Générale, verbo Transaction, Nos. 134, 135, 138; Duranton (Ed. Bruxelles, 1841), Liv. III, Tit. XV, Des Transactions, No. 416; Merlin, verbo Transaction, Sec. 4, II.

Forced heirs take by effect of law; their right of ownership can not be affected by will. C. C. 1493; 28 An. 198; 33 An. 4.

Walter D. Denégre Curator *ad hoc* for Defendant and Appellee:

The defence is payment; that Clarence Cochran has no further interest in the property, he having been settled with and paid in

full, not only for his interest in his grandfather's estate, but also for his entire interest in this specific piece of property, either as heir of his grandfather, Geo. W. Cochran, or as heir of his grandmother, Mrs. Martha A. Cochran.

The opinion of the court was delivered by

BREAUX, J. The plaintiff sues as an heir of his grandfather to recover an interest in property in defendant's possession.

He is one of three forced heirs of the succession.

The defendant and her sister were the other heirs.

The sister, Emma Cochran, died in 1889.

By last will and testament the defendant inherited all property left by the sister.

In 1878 plaintiff's grandmother, authorized by her husband, his grandfather, bought a lot and improvements in New Orleans.

On the face of the papers it was the property of the community existing at the time between plaintiff's grandfather and grandmother. The former died in 1884 and the latter in 1886.

The succession of the grandfather was opened in Kentucky and his will was propounded for probate in that State. He bequeathed his property to his wife. The mother of plaintiff, he being a minor at the time, represented by her, contested the application for probate.

The opposition was withdrawn on the execution of two notes of two hundred and fifty dollars each, by the legatees under the will (plaintiff's grandmother), in favor of plaintiff's guardian.

There was litigation in Kentucky to recover the payment of these notes.

Payment was refused on the ground that the guardian was without authority to represent her son, and that the notes were without consideration for the reason that the grandfather had, by will, disinherited plaintiff, his grandson, and that he was absolutely without interest to recover anything.

A judgment was pronounced decreeing that plaintiff was entitled to the sums represented by these notes.

We glean from the testimony that the withdrawal of the opposition to the probate of the will and the interest claimed for the opponent in the grandfather's estate were the moving causes of the compromise and the execution of the notes.

These notes were paid in execution of the judgment rendered.

The grandfather owned very little if any property other than community property in this State.

Pending the litigation on these notes the grandmother died, leaving her property to her daughters, and omitting as had the grandfather to mention the plaintiff, her grandson, as a legatee.

Her legatees offered her will for probate in this State, in which, as an absentee, she had immovable property.

The will was probated and the defendant and her sister, from whom she has since inherited, were recognized as heirs, and as such were placed in possession.

In the inventory the property is described and appraised as belonging to the succession of the grandmother. No reference whatever is made to the grandfather as part owner.

The plaintiff, availing himself of his forced heirship, contested defendant's rights to the entire property.

There was a compromise effected, under the terms of which he was promised the sum of three thousand dollars.

In order to enable the two heirs to raise the amount, they mortgaged the property of which plaintiff claimed to be part owner.

In all the proceedings in court, and in all transactions regarding the heirs and their interest, the succession is referred to as that of the grandmother alone.

But the property is described as a whole, and a value is placed upon it as belonging exclusively to her succession.

In other words, the compromise relates to plaintiff's estate *eo nomine*, but the description of the property includes the property of the grandfather.

Plaintiff's counsel, in support of the demand of his client, argues, substantially:

That the compromise did not contemplate including any of the rights of plaintiff, as forced heir, in the grandfather's succession, but that it was limited exclusively to the grandmother's property.

The defendant interposes the plea of payment, and pleads that plaintiff has no further interest in the property; that he has been settled with and paid in full, not only for his interest in the grandmother's estate, but also for his entire interest in the property, both as heir of his grandmother and as heir of his grandfather.

The judgment of the court *a qua* was in favor of the defendant. The plaintiff prosecutes this appeal.

BILL OF EXCEPTIONS.

The original compromise agreement was forwarded to the heir now deceased.

It was lost, and in consequence the defendant offered to supply the loss, and to that end produced a copy, substantially, of the *document* and offered verbal testimony.

The plaintiff objected, on the ground that the foundation had not been laid to admit secondary evidence of loss.

The testimony was admitted over plaintiff's objection.

The issue presented in the bill of exceptions is the first which presents itself for our determination.

The defendant deposed that her sister had sole charge, and acted in her own right and as her (defendant's) agent in making the compromise; that she never saw any of the papers; that she made thorough and diligent search in her sister's papers that came into her possession after her death, and searched in those places where there was any likelihood of finding them; that she had made every possible effort and inquired of those who might have seen them; all in vain.

There is no absolute rule upon the subject.

The required evidence to show the contents of an original paper will vary according to circumstances.

This defendant shows that she has exhausted her sources of information and the means of inquiry which suggested themselves.

Nothing creates the impression that the search has not been made in good faith. All that can be required, in the absence of the least cause of suspicion, is reasonable diligence to find the original.

In the case of Baines vs. Higgens, 2 L. 222, cited by plaintiff's counsel, the statement was made that the witness had seen the bill of sale among the papers of the deceased, and that some of the papers were lost.

The glaring defect was that the witness had never made search for the document, and did not establish a reasonable certainty of loss.

In another of the cited cases, Lockhart vs. Jones, 9 R. 386, affiant deposed that he had handed the letter to his attorney, and that since he had made search for it in his own office. Having

handed it to his counsel, an account of his search in his own office would not always make it evident that the writing is lost.

In Ticknor vs. Calhoun, 29 An. 278, the court held that the evidence did not establish the loss; the deposition of the attorney who testified about a transfer did not show that his client had exhausted all sources of information.

We do not think that the case at bar would justify excluding the evidence that was admitted regarding the contents of the written compromise.

ON THE MERITS.

The principle enunciated that compromises regulate only such matters as appear to be embraced in them by the intention of the parties, and that they should not be extended to other things, is plain and self-evident.

It remains for us to determine whether the facts of this case are within the application of the principle.

In the proceedings before the court having probate jurisdiction in Kentucky, the appearance of plaintiff's guardian was not limited to an opposition to the probate of the grandfather's will.

The interest of the plaintiff in the estate is referred to and does appear to have been overlooked when notes were executed in favor of the guardian. That interest is stated as being the consideration.

It is not established that the withdrawal of the opposition to the probating of the will was all that was required of the plaintiff in order that he might recover the amount promised.

If he had no right in the estate at all the withdrawal of the opposition was without any importance whatever and offered no consideration for executing two notes.

It is stated in positive terms in the pleadings that the notes were given in consideration of the interest of Clarence Cochran, plaintiff in this suit.

We do not think that it devolves upon us to decide that he was absolutely concluded by the proceedings before the court in Kentucky.

This was in 1884. His guardian had closely litigated the rights of her ward and had recovered payment of the notes.

She must have been advised of the extent of the interest of her son in the property in this State, and the son on reaching his majority in 1886 must have known that the property of which he claimed

a part was carried in the inventory of his grandmother's estate as belonging exclusively to that estate.

In all the calculations made with the view of agreeing upon an amount for his interest, the value of the whole property was the basis. After the amount had been agreed upon, the funds needful to pay the plaintiff were raised by placing a mortgage on the whole property to secure the loan that was applied to the payment of the plaintiff.

That method of obtaining the amount needed was generally discussed and the court has no reason to conclude that plaintiff's guardian and afterward the plaintiff himself were not fully informed upon the subject.

The act of compromise contains the declaration that upon payment of three thousand dollars, which were paid subsequently, the plaintiff obligated himself to execute a complete discharge of all rights and interest belonging to the succession of Mrs. Martha A. Cochran in Louisiana, particularly the property described and set forth in the inventory.

To illustrate:

A and B were the owners of property: the title was in the name of the former; but it was well known that the latter owned half.

After their death C and D, heirs, entered into a compromise and treated the property as belonging exclusively to A's succession, and then made a settlement entirely on that basis.

D, who received his share, determined by reference to the value of the whole property, has no right to claim an interest in B's half after having received his portion of the whole property.

The *res*, and not a mere name, enters into the consideration of the question involved.

The plaintiff has received his fractional interest in the thing, whether in the name of his paternal ancestor or in the name of his maternal ancestor; it does not alter the fact that he is paid in full.

The defendant, before this court, prays for damages for frivolous appeal. The issues are not frivolous, and not such as authorize us to grant damages.

The judgment is affirmed at plaintiff and appellant's costs.

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No. 11,348.

J. W. CASTLES, LIQUIDATOR, VS. CITY OF NEW ORLEANS ET ALS.

In the assessing of the shares of stock under Sec. 27 of Act. 106 of 1890, it is no ground for annulling the assessment when the list of shareholders appear in a different part of the assessment book from that in which the assessment is first noted, if there has been a substantial compliance with the law in assessing the shares to each stockholder.

The assessment book may not be conveniently and artistically arranged, but this does not injure the bank, as it is only the agent of the shareholders for paying the tax.

PPEAL from the Civil District Court, Parish of Orleans.
King, J.

Farrar, Jonas & Kruttschnitt Attorneys for Plaintiff and Appellee.

The shares of a national bank must be assessed to the shareholders and not to the bank, and an assessment made of such shares *in globo* to the bank is null and void, and in contravention of the statutes of the State, and the statutes of the United States. Revised St. U. S., Sec. 5219; Revenue Act of 1890; Board of Liquidation vs. Thoman, 42 An. 606; Insurance Company vs. Board of Assessors, 42 An. 1132; Miller vs. The First National Bank, 25 Am. and Eng. Corp. Cases, 289; City of Springfield vs. First National Bank, 14 Am. and Eng. Corp. Cases, 342; Morse on Banks and Banking, Vol. 2, Part 2, Sec. 141, and authorities there cited.

A pencil memorandum containing the list of the shareholders of a bank in the back of the assessment roll, not conected therewith by any memorandum or reference, not included in the aggregate footings of the assessments of each district, not described by any district or locality or square, is not a part of the legal assessment roll. Albany City Bank vs. Maher, 6 Fed. Rep. 417.

If such assessment is no part of the assessment roll, and there is, in the proper place in the assessment roll, an assessment of all the stock of the bank *in globo* to the bank, and such assessment is void, the bank is not estopped by having made application to reduce the amount of such assessment.

E. A. O'Sullivan, City Attorney, and *Horace L. Dufour*, Assistant City Attorney, for Defendants and Appellants:

The assessment complained of is legal and valid, and in accordance with the statute. Sec. 27 of Act 106 of 1890.

Plaintiff is estopped by its conduct from urging the invalidity or illegality of the assessment, having recognized its legality and validity by making application for correction on grounds other than those urged in the petition, which are now advanced for the first time.

The objections urged against the assessment come too late, plaintiff having failed to make application for relief to the board of assessors or committee of the council on the grounds urged in the petition. These prerequisites are sacramental conditions precedent to obtaining relief. 32 An. 160; 34 An. 372; 39 An. 208; 41 An. 1047; 43 An. 813.

Under Act 96 of 1877, which applies to the city, twenty per cent. damages should be granted in dissolving injunctions of this kind. Sec. 55, Act 96 of 1877; Succession of Stewart, 41 An. 130.

The opinion of the court was delivered by

McENERY, J. The plaintiff, liquidator of the late Southern National Bank, instituted this suit to restrain the city of New Orleans from collecting a tax of ten thousand two hundred and eight dollars, assessed against the shareholders of said bank.

The averments in plaintiff's petition are that, under the laws of the United States and the laws of the State of Louisiana, the assessment should have been against the shareholders individually and by name, showing the amount of taxes due by each shareholder, and to deduct the same from the interest of the shareholder in the bank; that the Board of Assessors in making the assessment violate the laws of the United States and of this State, as they made the assessment for five hundred and ten thousand four hundred dollars against the shareholders in block and against the Southern National Bank for account of the shareholders.

The city answered by a general denial and prayed for the dissolution of the injunction, with statutory damages.

There was judgment for plaintiff as prayed for. The city appealed.

Sec. 27 of Act 106 of 1890, under which said assessment was made, is as follows: "That no assessment shall hereafter be made under that name, of the capital stock of any national bank, State

bank, banking firms or banking associations, whose capital stock is represented by shares, but the shares shall be assessed at their actual value as shown by the books of the bank, or banks, to the shareholders who appear as such upon the books, regardless of any transfer not registered or entered upon the books; and it shall be the duty of the president, or other officer, to furnish to the assessor a complete list of those who are borne upon the books as shareholders; and all taxes assessed shall be paid by the bank, company, firm association or corporation, which shall be entitled to collect the amount from the shareholders or their transferees." * * * *

On page 24 of the assessment book the shares are assessed:

"Southern National Bank, square 227, Varieties and Gravier street; No. of shares, 500.000; value of each share, $102.08; total value of shares, $510,400."

On the bottom of the page are memoranda showing by what process of calculation the value of each share was ascertained.

On page 124 of the book is a "List of shareholders of the Southern National Bank." This is followed by the name of each shareholder, with the number of shares owned by him, the value of each share and the total value of all the shares owned by him, assessed to him and opposite his name in the appropriate columns.

The shares, therefore, are not assessed to the bank in block, but to the individual shareholders.

The book, or volume 1, is the assessment roll, on which the assessment of the shares is entered. The roll is an entirety, and the assessment of the shares does not appear on a list separate or apart from the roll.

Mechanically, the assessment roll might have been more artistic, and somewhat more convenient, by arranging the list of shareholders on page 24, immediately following the memoranda of "shareholders of the Southern National Bank," and the tabulated statement following, instead of preceding this list. But it is not apparent how or in what manner the bank has suffered injury by this arrangement.

The assessment is a substantial compliance with the law, and although on the book there is no extended space for the insertion of the tax against each shareholder, yet the value of the share is the basis for the apportionment of the tax on the shares on the tax roll.

The omission of the tax on the assessment roll will not increase the tax when extended on the tax roll; and, as the mere agent of

the shareholders, for paying the tax, the bank's interest in the mere mechanical arrangement of the assessment is very remote.

We do not find, however, in Act 106 of 1890 any provision making it the duty of the assessor to extend, in a separate column, the tax assessed against the property. This is done on the tax roll.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered that the injunction sued out herein be dissolved and set aside, without damages, plaintiff to pay costs of appeal.

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No. 11,394.

W. R. WADSWORTH VS. THE CITY OF NEW ORLEANS.

In a suit by the alleged transferee of certificates or claims against the city, and the ownership of the transferee is specially denied, there must be evidence of the transfers executed by the parties to whom the amounts of the claims or certificates were primarily due. 42 An. 164; 43 An. 78.

A transcript, purporting to be from the books of the Comptroller, headed "Recorded in Comptroller's books in name T. Nolan, transferee," and followed by a list of names and amounts, offered to show the transfers of the claims and certificates by the parties named, does not establish ownership in the transferee, nor was it admissible for that purpose.

APPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

E. A. O'Sullivan, City Attorney, *H. L. Dufour* and *Henry Renshaw*, Assistants, for the City.

Charles Louque Attorney for Plaintiff and Appellant.

The opinion of the court, affirming the judgment of the District Court, was delivered by MILLER, J.

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No. 11,547.

STATE OF LOUISIANA VS. GABE JONES.

The accused appealed from the verdict and sentence refusing him a new trial on the ground of newly discovered evidence.

Applications for new trials on this ground must be received with caution; there was an absolute want of ordinary diligence on the part of accused.

The court that sat on the trial, that heard the witnesses, had opportunity to form an opinion of the facts and attending circumstances, and having determined that the newly discovered evidence was cumulative, will not be overruled by this court.

The accused having applied for an order to examine witnesses on a day fixed, his failure to call witnesses that were within the process of the court add to reasons justifying refusal of a new trial. Examination of witnesses to prove newly discovered evidence was within the discretion of the trial judge. Citing, State vs. Washington, 36 An. 341; State vs. Beiard, 34 An. 105.

APPEAL from the Criminal District Court, Parish of Orleans. *Moise, J.*

M. J. Cunningham, Attorney General, and *Jno. J. Finney*, Assistant District Attorney, for the State.

Louis P. Paquet Attorney for Defendant and Appellant.

The opinion of the court, affirming the judgment of the District Court, was delivered by BREAUX, J.

No. 11,551.

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THE STATE VS. CHARLES LEDUFF.

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Whatever the answer of the juror on his *voir dire* to the questions of counsel for the accused, if it appear on the whole examination, and especially to the questions of the judge, that the juror has no fixed opinion—*i. e.*, that can not be changed by testimony, and his mind is in a condition to do justice, according to the evidence and the charge of the court, he is a competent juror. 35 An. 302, 317; 38 An. 41, 480.

If the accused obtains an acceptable jury without exhausting his peremptory challenges, this court will not direct a new trial, because the bill assigned error in the overruling of the challenges for cause made by the accused. *Ibid.*

APPEAL from the Fourteenth Judicial District Court, Parish of Pointe Coupee. *Talbot, J.*

M. J. Cunningham, Attorney General, and *Alex. Hebert*, District Attorney, for the State.

Yoist & Claiborne Attorneys for Defendant and Appellant.

The opinion of the court, affirming judgment of the District Court, was delivered by MILLER, J.

No. 11,527.

STATE OF LOUISIANA VS. BEN SAINTES.

In the absence of some charge of fraud or wrong committed in the drawing or the summoning of the general *venire* of jurors, which would work great and irreparable injury, a motion to quash and set aside the *venire* can not prevail. Citing Act 44 of 1877, Sec. 10.

APPEAL from the Nineteenth Judicial District Court, Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, and *R. F. Broussard*, District Attorney, for the State.

Edward Simon and *L. O. Hacker* Attorneys for Defendant and Appellant.

The opinion of the court, affirming judgment of the District Court, was delivered by WATKINS, J.

Rehearing refused.

46a 547
49 65

46a 547
104 585

46 547
Case 1
106 662

46 547
Case 1
115 943

No. 11,509.

THE STATE OF LOUISIANA VS. HENRY JACKSON.

In an indictment for rape the averment that the act was committed against the will and consent of the female, is equivalent to the averment "without her consent." Hence, under such indictment, testimony is admissible that she was under the consenting age, the testimony supporting the averment "without her consent." Wh. C. L., Secs. 556, 558, 559; 1 Bishop, 1121, 1122; 2 Bishop, 61.

APPEAL from the Eleventh Judicial District Court, Parish of St. Landry. *Perrault, J.*

M. J. Cunningham, Attorney General, and *E. B. DuBuisson*, District Attorney, for the State.

Jno. N. Ogden and *W. W. Bailey* Attorneys for Defendant and Appellant.

The opinion of the court, affirming the judgment of the District Court, was delivered by MILLER, J.

46 547
Case 2
f118 1016

No. 11,557.

STATE OF LOUISIANA VS. GRANT RUTLEDGE.

A transcript of the record of appeal not filed on the return day nor within three judicial days following the return day, the appeal will be dismissed.

APPEAL from the Twenty-first Judicial District Court, Parish of Jefferson. *Rost, J.*

The Attorney General moved to dismiss the appeal; the counsel for the Defendant and Appellant joined in the motion.

The opinion of the court was delivered by BREAUX, J.

No. 11,545.

THE STATE OF LOUISIANA VS. THEOGENE LABAUVE.

The defendant was convicted of larceny. He alleges as errors:

1. That the general venire for the term had been illegally drawn. This ground is not tenable, for, though under indictment, he did not move to annul and set aside the *venire* on the first day of the term.
2. That one of the jurors was a non-resident. This ground is not sustained by the facts certified to this court; moreover application for a new trial for this cause should show not only that defendant was not, but that counsel also was not aware of any fact affecting competency of juror, if he was incompetent.
3. That one of the defendant's witnesses, charged with perjury, was arrested in the presence of the jury that tried him. It is not shown that the arrest was made in the presence of the jury. State vs. Ford, 37 An. 456.
4. That the property alleged to have been stolen was not described. The property was described with legal certainty. Quoting State vs. Johnson, 30 An. 904; State vs. King, 37 An 179; State vs. Bassett, 34 An. 1108; State vs. Carter, 33 An. 1274; State vs. Curtis, 44 An. 320.

APPEAL from the Seventeenth Judicial District Court, Parish of Vermilion. *Allen, J.*

M. J. Cunningham, Attorney General, and *M. T. Gordy, Jr.*, District Attorney, for the State.

L. L. Bourges and *A. & Chas. Fontelieu* Attorneys for Defendant and Appellant.

The opinion of the court, affirming judgment of District Court, was delivered by BREAUX, J.

No. 14,466.

A. T. FELT VS. THE VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY.

In a suit for damages against a railroad company for opening one and closing two culverts in the road-bed, extending through plaintiff's land, by which it is claimed by plaintiff, the rain and seepage water were made to stand in his field, and drainage prevented, causing the loss of crop; the court will inquire into the situation of the land and its means of drainage, and the company will not be held responsible, if from the testimony it appears the plaintiff's alleged losses were due to depressions in the land, and obstructed drainage, not at all connected with the closing or opening of the culverts.

APPEAL from the Seventh Judicial District Court, Parish of Madison. *Montgomery, J.*

The judgment of the District Court sustained the demand of plaintiff for the removal of the box culverts and rejected all claim for damages.

James T. Coleman Attorney for Plaintiff and Appellant.

Stubbs & Russell Attorneys for Defendants joining in the appeal asking that Plaintiff's entire demand be rejected.

The opinion of the court, reversing the judgment of the District Court and rejecting plaintiff's demand, was delivered by MILLER, J.

No. 11,400.

F. P. GRAVELY VS. SOUTHERN ICE MACHINE COMPANY.

A substantial compliance with the provisions of the law (Act 37 of 1882) in reference to third persons claiming personal property seized, is all that can be required. Making affidavit as to the character of the ownership thereof with a view of demanding a bond of indemnity is such compliance. When the civil sheriff refuses, after such a notice, to proceed with a sale under execution until bond shall have been furnished by the seizing creditor, the court will not disturb the ruling of the lower court, refusing to set aside seizure, but staying execution until further orders.

APPEAL from the Civil District Court, Parish of Orleans. *Rightor, J.*

The plaintiff, Gravely, in execution of a judgment in his favor against the defendant Ice Company, seized the claim sued upon in Stewart, assignee, vs. Judah Hart *et al.* On December 15, 1893, T. F. Stewart filed with the civil sheriff his affidavit setting forth that the Southern Ice Machine Company had executed its private deed of assignment to him of the claim seized; that he took possession thereof, and that the claim was worth its face value, the sum of sixty-three thousand dollars; thereupon the civil sheriff called upon Gravely, the seizing creditor, to furnish a bond in the sum of one hundred and twenty-six thousand dollars. On November 17, 1893, plaintiff proceeded by rule against the civil sheriff, to show cause why he should not proceed with the execution and sale, on the ground that the affidavit of Stewart was insufficient to justify the demand for an indemnity bond. The sheriff notified the attorneys of Stewart of the taking of said rule, and requested that they defend the same. The said attorneys declined to take notice of the rule, and demanded the notice of three days required therefor by the rules of the court. Before proceeding to try the rule, the sheriff objected that Stewart should be made a party thereto; this was refused by the court, which then rendered a judgment ordering that the sale be deferred until further orders, without detriment to the seizure, which should continue until the rule was passed upon; the trial of which rule was suspended until further orders.

Branch K. Miller Attorney for Plaintiff and Appellant.

Wynne Rogers Attorney for Civil Sheriff, Appellee.

The opinion of the court, affirming the ruling of the District Court, was delivered by WATKINS, J.

46 550
49 1571

46 550
f120 596

46 550
123 578

No. 11,442.

STATE OF LOUISIANA VS. SONNY ALEXANDER.

ON JUDGMENT AGAINST SURETY ON APPEARANCE BOND.

The appellant seeks to avail himself of the delays in civil proceedings, in which a devolutive appeal may be taken within one year from date of judgment. Forfeiture of bonds under act of March 11, 1837, Revised Statutes, Sec. 1032, is a proceeding criminal in its character. State vs. Cassidy, 7 An. 276; State vs. Williams, 37 An. 200

Appeals from sentences and judgments in the Criminal District Court of the parish of Orleans must be taken in conformity with the statute regulating appeals in criminal cases.

Judgments forfeiting bonds by said court are controlled by the same statute. State vs. Burns, 38 An. 363.

The judgment of forfeiture was rendered January 17, 1893; the appeal was taken January 15, 1894. The appeal is dismissed.

APPEAL from the Criminal District Court, Parish of Orleans. *Ferguson, J.*

E. A. O'Sullivan, City Attorney, for Appellee.

Jos. D. Kiernan, J. Z. Spearing and *Bernard Titche* Attorneys for Surety, Appellant.

The opinion of the court was delivered by BREAUX, J.

No. 11,362.

MRS. JOHANNA TRAIN AND MRS. NESTOR FAIVRE VS. MRS. CATHERINE CRONAN ET AL.

The rule is that when the opinion of the possessor who holds an object under a title of sale has a just ground, though in fact there is no sale, the opinion is equal to title.

A title defective in form can not be the basis of prescription. By this is meant a title on the face of which some defect appears, and not one that may be found defective by circumstances, or evidence *dehors* the instrument.

APPEAL from the Civil District Court, Parish of Orleans. *Rightor, J.*

P. M. Milner Attorney for Plaintiffs and Appellants:

Prescription can not be accepted as intended to perfect titles in cases in which the gravest irregularities and absolute nullities have been propounded. 32 An. 914.

Henry P. Dart Attorney for Defendants and Appellees:

When the widow and heir of the dead defendant acquiesce in the execution of a judgment affirmed against him on appeal, after his death, they are estopped to contest the validity of that.

execution. Under such a showing, the burden of proof rests on the plaintiff, not only to establish the original title of their ancestor, but also to establish that they have been illegally evicted therefrom, and that the present possessors of the realty are in bad faith; otherwise the prescription of ten years, pleaded by the defendants, is well pleaded. Patterson vs. Maloney, 38 An. 885; C. C. 3481.

The opinion of the court was delivered by

WATKINS, J. This is a petitory action instituted by the widow and sole surviving heir of George W. Train, deceased, for the recovery of two lots of ground situated in the sixth district of the city of New Orleans, charging an illegal and simulated sale thereof in August, 1875, under a certain void and illegal judgment and sale, through the instrumentality of which they were dispossessed in the year 1878.

The statement of plaintiff's case, as it appears in their counsel's brief, is as follows, viz.:

"The petition avers that plaintiffs, Mrs. Johanna Train and Mrs. Nestor Faivre, the former the widow of George W. Train, and the latter the only surviving child of said Train, are the owners of the property described therein; that George W. Train died the 19th of March, 1871; that at the time of his decease he was the lawful owner and possessor of the property aforesaid, which plaintiffs have inherited; that said property was acquired by said Train by authentic act of purchase, 12th June, 1866; that the plaintiffs have been illegally dispossessed of same by virtue of an alleged judgment, execution and sale in suit No. 1265 of the Sixth District Court, entitled Garrish vs. George W. Train; that in said suit, pending an appeal to the Supreme Court, George W. Train departed this life; that nevertheless a judgment, *eo nomine*, against defendant was rendered, without making his heirs parties; that his legal representatives were never made parties in the lower court; that the return on a *fi. fa.* to make damages shows that defendant, George W. Train, was dead; that nevertheless the property was sold August 14, 1875; that petitioner remained in possession until some time in 1878; that these proceedings, judgment, execution and sale are absolute nullities. Petitioners aver that defendants, Mrs. Cronan and husband, are

in possession of said property; they charge simulation and bad faith in the successive conveyances; and pray for judgment decreeing the aforesaid judgment, execution and sale and sheriff's deed absolute nullities, and the conveyances under which defendants claim null and void; they pray that they do recover the property and the revenues of which they have been illegally deprived."

The defendant tendered various technical pleas, such as misjoinder of defendants, *res adjudicata*, estoppel, no cause of action, and the prescription of ten years, all of which were overruled except the last, and judgment rendered in favor of the defendant Cronan.

It is from that judgment the plaintiffs have appealed. In this court the defendant and appellee filed an answer to the appeal and requested an affirmance of the same; and, in the alternative that this court should not favorably consider her plea of prescription, she prays that her other demands and exceptions be sustained and that thereupon judgment be affirmed.

To this answer the appellants object and protest, on the ground that it seeks an amendment of the judgment, and that it comes too late, same not being notified to them.

The order of appeal made this case returnable on the first Monday in November, 1893, but it was not fixed for trial until the third of January, 1894, at which time it was not reached, and was therefore continued. It was again set down for trial on the 14th of March, 1894, when it was argued and submitted.

Consequently, the appellee's answer was in ample time, having been filed on the 29th of December, 1893. Appellants were not entitled to any notice of the filing of appellee's answer, and a simple inspection of the record would have furnished them all the information that was necessary. Appellee's brief was filed in this court on the date the cause was first fixed for trial. The objection is untenable.

Taking up the defendant's plea of ten years' prescription, on which the lower judge founded his judgment, we find the facts to be as follows, viz.:

Mrs. Catherine Cronan, defendant, acquired the property in dispute on the 30th day of April, 1892, by purchase from Charles L. Wirth and Ernestine Piper, by a notarial act of sale in due form, which contains the recital that Mrs. Piper acquired title by purchase

from Henry F. Davis, by notarial act, under date July 18, 1878, duly registered in the book of conveyances.

Reference to the act of that date shows that Henry F. Davis sold same property to Mrs. Piper for a valuable consideration, and with full warranty, the act reciting that the property conveyed was the same that the vendor acquired by purchase at sheriff's sale made in the suit of Joseph Garrish vs. G. W. Train, No. 1625 on the docket of the Sixth District Court of the parish of Orleans, on the 14th of August, 1875, the sheriff's deed bearing date February 9, 1878, and likewise duly recorded.

The *proces verbal* of the sheriff's sale was not put in evidence, but a conveyance certificate was introduced, and it shows the fact of the sheriff's adjudication as recited in Davis' deed, and gives full particulars of date and description.

The defendant states as a witness that she purchased the property as stated in her title and paid the purchase price. That, before purchasing, she had a lawyer to examine the titles to the property, and he pronounced them good, and on the faith of his report she made the purchase. That soon after her purchase she went into actual possession of the property and commenced the erection of a house, when this suit was brought. That at the time of her purchase she was not aware that there was any complaint about the titles to the property.

The defendant's title is traced back to the sheriff's sale made under executory proceedings in 1878, under which G. W. Train was divested of possession and Henry F. Davis, adjudicatee, was placed in possession, under an order of court, and in which the plaintiff evidently acquiesced.

Referring to the record of the suit of Joseph Garrish vs. G. W. Train, in this court—which is brought up in the original—we find that the order of seizure and sale bears date October 18, 1870, and was predicated upon an act of special mortgage of date April 20, 1867—just one year subsequently to his purchase of the property from Pliny Earl Davis, the title on which the present suit is founded.

The defendant appealed suspensively from the order, and the appeal was presented and decided on an assignment of errors, and the decree of this court confirmed the order and awarded ten per cent. damages.

We find nothing in the record to show that the defendant was dead

at the time judgment was rendered, on the 20th of April, 1874; and the extracts in evidence from the Sixth District Court show that the purchaser was put in possession of the property in pursuance of an order of court.

We think there can be no question of the defendant's title being perfected by the prescription of ten years under a title translative of property, under the principles announced by this court in Patterson vs. Malony, 38 An. 885.

Judgment affirmed.

Rehearing refused.

No. 11,379.

CITY OF NEW ORLEANS VS. HOME INSURANCE COMPANY.

The defendants made a return showing money at interest, its credits and its bills receivable, which was received as correct by the assessor.

In answer to plaintiff's rule and in defence the defendant alleges that losses by fire were suffered to a large amount shortly after its return had been made to the assessors.

The evidence is that none of the money at interest, credits and bills receivable assessed remain.

The requisite demand prior to seizure of other property than that assessed has been made.

The plaintiff has exhausted its remedy by rule to compel the delivery of the property assessed. The right to seize other property than that assessed becomes the issue.

It is reserved to the plaintiff, subject to such legal right as the defendant may plead.

APPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

E. A. O'Sullivan, City Attorney, *Geo. W. Flynn*, Assistant City Attorney, for Plaintiff and Appellee, cite Sec. 31, Act 106 of 1890; Ice Company vs. Tax Collector, 42 An. 669; Sec. 20, Act No. 7 of 1870; Mullan vs. Creditors, 39 An. 397; Sec. 22, Act 20 of 1882.

Farrar, Jonas & Kruttschnitt Attorneys for Defendant and Appellant:

Where a rule is taken upon a tax debtor to produce property taxed, in order that it may be sold by the tax collector, proof that such debtor has none of the property in his possession is a

perfect defence, because the judgment can only be that he produce the property, and the court will not order a vain thing. State vs. V. & A. Meyer & Co., 41 An. 436.

Since the passage of Act No. 135 of 1888 the city is required to farm out and adjudicate the contract to collect delinquent taxes and licenses to the lowest bidder, after public advertisement. See Sec. 7 of Act. This act divests the treasurer of all power to take judicial or other proceedings for the collection of a tax; and he has no more power and authority in the premises than the Commissioner of Public Works, or any other city official.

The opinion of the court was delivered by

BREAUX, J. The plaintiff, by rule, seeks to compel the defendant to deliver personal property, for the taxes of 1892, in order to sell it at public auction to satisfy the taxes, penalties and costs.

The property is described as money at interest, credits and bills receivable, amounting to two hundred and ten thousand one hundred dollars, and money in possession, eleven thousand two hundred dollars.

The taxes claimed by the city is four thousand four hundred and seventy and twenty-six-one-hundredths dollars, plus interest.

The assessment was proved as alleged by the plaintiff.

The defendant, through its president, deposes, that its return, dated January 27, 1892, to the Board of Assessors, which served as a basis of the assessment, was correct, at the date it was made.

That the company suffered severe losses between the 18th of January and the 3d of April of that year; the net amount of these losses was one hundred and fifty-eight thousand dollars. The items of the different losses are given in a statement filed in evidence.

The witness referred to the fires that occurred on Canal street and those among the cotton presses as having caused the loss.

He also stated that the losses were paid out of the property assessed and that none of the cash on the bills receivable taxed remained on March, 1893, at the time the rule was filed.

The judge of the District Court, upon these facts, found that the defendant company had on hand none of the money at interest and cash assessed. The rule was dismissed.

The plaintiff, a municipal corporation, can proceed by rule to compel the tax-payer to deliver to the tax collecting officer the personal

property assessed, to the end of realizing, at public sale, the amount of the taxes, costs and penalties.

The plaintiff's remedy in this respect is similar to that of the State.

On the merits, the argument on the part of the plaintiff is that the net loss is less than the amount assessed, and, that as there is a remainder of the property, the sale should be made absolute as to this remainder.

The amounts themselves sustain that contention, for the property assessed was valued at two hundred and twenty-one thousand three hundred dollars.

While the extent of the losses in the figures given is one hundred and fifty-eight thousand dollars, caused by fires.

There is other testimony on the subject that does not limit the losses to the last figures.

There has been a constant depreciation in values and in consequence it is stated that the surplus is no longer what it was.

These statements are not irreconcilable with the statement that the amount of loss from certain fires was one hundred and fifty-eight thousand dollars.

To that amount these figures are corroborative.

The absolute, uncontradicted testimony is that in consequence of the company's losses none of the cash or bills receivable taxed remained in possession of the company.

With the evidence before us we do not feel authorized to conclude that there remains any of the property assessed, the delivery of which can be compelled.

It would not be reasonable to order a company to deliver property the president, the only witness, deposes it has not in its possession.

The plaintiff has exhausted whatever remedy it had by rule.

Whatever may be the cause of the disappearance of the values assessed, the fact remains that they are no longer in possession.

Nor can the responsibility of the parties for its disappearance be tested on the rule at bar.

It is the duty of the tax collecting authority to enforce payment by seizing, when possible, the property assessed.

It is authorized to rule the tax-debtor into court to compel him to deliver the property that it may be seized.

If the property assessed "has been concealed, parted with or dis-

posed of" by the tax-debtor, so that its seizure has been rendered impossible by the debtor's acts, seizure of other property becomes possible.

The property in the case at bar has been disposed of, whether legally or not is a question that can not be determined on the trial of this rule.

The remedy is pointed out by the statutes. Until applied in the manner pointed out, the courts are not called upon to determine whether the disposition made of the property renders it impossible to collect the tax.

The defendant has presented, as an additional ground of defence, that the power of the City Treasurer was divested and taken away from him by Sec. 7 of Act 135 of 1888, which provides that at the end of each year the council shall farm out and adjudicate the contract to the lowest bidder; that the section is mandatory, and that only the one to whom the collection of the taxes has been farmed out has any power or authority to collect the taxes.

The rule is presented by the City Attorney, who alleges that the defendant is indebted to the city for taxes.

The Treasurer is also a party to the rule.

It was not sued out exclusively in the name of the city, but the city is sufficiently a party to sustain the demand for delivery of the property assessed in order that taxes due it may be collected.

It is the city's proceeding by rule to compel payment to the proper officer. The municipality has the authority to enforce the payment of taxes, and has, to that end, all the remedies given to the State for the collection of her taxes.

If no farmer of the tax has been selected, or if that official is recreant to his trust, or if for any other reason he does not choose to act, the municipal government is not divested of all its authority of enforcing the payment of taxes due.

The right of the city to proceed, after an ineffectual attempt has been made to have the property assessed delivered, to be sold for the payment of taxes, is reserved in the judgment appealed from—*i. e.*, the right to seize other property than the property assessed without prejudice to such legal defences as the defendant may have to offer.

It is therefore ordered, adjudged and decreed that the judgment of the court *a qua* is affirmed.

Rehearing refused.

No. 11,408.

WIDOW S. DURWARD ET ALS. VS. MRS. JENNIE JEWETT ET ALS.

In an association like the Iron Hall where all the members, although residing in different jurisdictions, are bound by a common contract to the Supreme Representative of the order, which manages a trust fund for the benefit of the entire membership, if a court at the domicile of the association appoint to it a receiver, on account of its insolvency, it is competent for a court in another jurisdiction to order trust funds, forming a part of the trust funds held by a local branch, to be paid into the hands of the receiver.

It is no objection to such an order that the central authority has made a regulation that only a certain portion of the trust fund shall be forwarded to it at stated times. The insolvency of the association makes the whole fund demandable for the purposes of distribution among those who have acquired rights on it.

APPEAL from the Civil District Court, Parish of Orleans.
King, J.

Morris Marks and *Albert Voorhies*, Attorneys for Plaintiffs and Appellees, cite Niblack on Mutual Benefit Societies, pp. 156, 157, 167, Secs. 135, 136.

Branch K. Miller, Attorney for Defendants and Appellants, cites 81 N. Y. 508; 129 Mass. 70; 137 Mass. 372; 31 Hun. (N. Y.), 553-4; 24 N. E. 374; 4 Penn. St. 519; 16 Fed. Rep. 14; Faily vs. Taulbee, 55 Fed. Rep. 892.

The opinion of the court was delivered by

MCENERY, J. The plaintiffs are members of branch No. 1148 of the Order of the Iron Hall. This society or association is insolvent, and is in the hands of a receiver appointed in the State of Indiana, at its headquarters or domicile at Indianapolis.

The plaintiffs allege that the Iron Hall has ceased to exist, does no business; and, as members of branch 1148, they fear that the officers thereof will send the money, property, etc., of said branch to the receiver in Indiana. They pray for an injunction restraining them from sending said money, etc., beyond the limits of this State. The injunction issued as prayed for, and on its trial was perpetuated, and, in accordance with the prayer of the petition, the property was deposited in court.

Subsequently an order was granted distributing the fund among

the members of branch 1148. The officers against whom the injunction issued resist the same, on the ground that the money belongs to the "Supreme Sitting" of the order—that is, to the entire membership of the order, of which the former is the representative.

The fund in controversy is the reserve fund from assessments made prior to the appointment of a receiver. It is true that the Iron Hall is hopelessly insolvent; but, as it is a corporation, organized under the laws of Indiana, the appointment of a receiver did not destroy its corporate existence, unless there had been a judgment forfeiting its charter and a receiver appointed to wind up its affairs in accordance with the decree. But it does not appear that any such decree of forfeiture has been rendered.

When the receiver was appointed, he undertook, under the supervision of the Indiana court, to manage the affairs of the corporation, substituting the court's administration of its affairs for that of the officers of the corporation. Faily vs. Taulbee, 55 Fed. Rep. 893.

The Iron Hall was organized as a mutual benefit society. Assessments were made for various purposes—to take care of the sick, to pay insurance on the lives of deceased members and to provide a benefit fund for all who had complied with the rules and regulations, of a sum not exceeding one thousand dollars.

All who became members of the order were bound by the rules and regulations, and there was a contract between and among all its members throughout the many States in which the order existed. All who have complied with the rules and regulations have rights upon the reserve fund—the sick, the heirs of deceased members and those who were entitled to the benefit fund shown by certificates against the assessments of which the reserve fund forms a part.

The assessments were made for the purpose of meeting their obligations, and the fund arising thereform is a trust fund held by the the order either immediately or through its branches for destination to its proper uses.

Section 1 of Law II of the order is that twenty per cent. of the amount reserved by each branch on each assessment shall be set aside and retained as a reserve fund, which is declared to be the property of the Supreme Sitting and shall be subject to its control at all times as provided by the order. After the expiration of six years and six months from the date of the organization of the order, one-seventh of the reserve fund, then on hand, shall be called for to pay benefits,

and annually thereafter one-seventh of the reserve fund shall be called in for like purpose.

Section 2 restricts the investment of the reserve to the local branch, and provides for the manner of its investment. Plaintiffs contend that the order having ceased to exist and being no longer able to carry out its objects and purposes, that said fund reverts to the original subscribers of the branch.

This was a trust fund, and held not alone for the benefit of the members of the local branch, but for all the membership of the order. The fact that the trust could not be carried out as originally intended can not deprive these members of the rights which they have acquired on the trust fund. Every member of the order must be to some extent likened to a shareholder in a business corporation. The forfeiture of the franchise does not include forfeiture of property, and when this has been declared extinguished property rights are not destroyed. Courts will so manage the property as to preserve all rights upon it according to law. Morawetz Private Corporation, par. 1033.

And the fact that the legal title to property becomes extinguished by a dissolution of the corporation does not destroy the rights of beneficial owners upon it. *Id.* 1032.

The members of the order, like shareholders, are the beneficial owners of the twenty per cent. reserve fund. All who have paid assessments have an interest in this fund, whether he resides in Indiana, New Jersey, or this State. It was made for a specific purpose, the benefit of which was to inure to the whole brotherhood, and not for any particular branch.

"Equity will always protect the rights of a *cestui que trust* without regard to the strictly legal title; and, therefore, when a corporation is dissolved, a court of equity will recognize and protect the equitable rights of the shareholders, for whom the corporate body as recognized by law was merely a representative, or trustee, and the assets of the dissolved corporation will be treated in equity as a trust fund belonging to the shareholders of the company, subject to the rights of its creditors." Morawetz Private Corporation, 1032.

The organization of the courts of Louisiana, the principles enunciated in the code and the rules of practice enable them to fully carry out this equity doctrine.

The Supreme Sitting is unquestionably the *owner* of the fund. It was held for it by the local branch, and for the purpose of carrying out the trust has the right to demand the fund from the local branch.

The fund was to be called for after the lapse of time in small amounts. But when the corporation became insolvent and was placed in the hands of a receiver the entire amount became due and demandable in order to satisfy those who had claims upon it.

The fund had been paid in on assessments. Individual ownership over the amount ceased. Title was vested in the Supreme Sitting, and the local branch only held it for it, and it did not extinguish ownership, but only regulated a call on it at stated periods. The inability to carry out this regulation did not cause the fund to revert to those who had paid the assessments.

In the case of Faily vs. Taulbee, 55 Fed. Rep., p. 892, there was a proceeding instituted by the receiver of the Iron Hall to gain possession of the reserve fund held by a local branch in Rhode Island.

The defendants in that case urged what the plaintiffs do here.

The United States district judge in that case said: "The argument then is that, according to this law, the Supreme Sitting can call for the reserve fund only at certain times and for certain purposes, and therefore the receiver can call it in only at those times and for those purposes, and not for the general purposes of liquidating the whole trust fund. This argument, I think, rests on a misapprehension of the effect of the laws of the society. They undoubtedly do impress upon the funds the character of trust funds, and perhaps affect different parts of the fund with different equities, but as to the time and manner of ascertaining and marshaling these equities, and as to the method of administration of the fund accordingly, they must be taken to be abrogated in the case where, as this bill alleges, the society is insolvent."

In an association like the Iron Hall, where all the members of the society, although residing in different jurisdictions, are bound by a common contract to the Supreme Representative of the order which undertakes to manage a trust fund for the benefit of all its members, if a court of the domicile of the order which assumes jurisdiction appoint a receiver on account of insolvency, it is competent for a court in another jurisdiction to order funds, forming a part of the trust funds, to be paid into the hands of the receiver. *Id.* The receiver is not here demanding this reserve funds but the injunction

issued on the hypothesis that he might demand them. Hence we have of necessity been compelled to treat the case as though the receiver was plaintiff in a demand for the fund.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed. It is now ordered that the demand of plaintiff be rejected and the injunction dissolved.

Rehearing refused.

No. 11,396.

C. H. PARKER, STATE TAX COLLECTOR, VS. SHAREHOLDERS OF THE SOUTHERN BANK.

The attorney appointed to assist the tax collector is not an assistant to that official in his capacity as tax collector, but is appointed as a necessity for the purpose of bringing suits, which is an employment separate from and independent of the duties of the tax collector's office. Sec. 54 of the Act 55 of 1818 is not in conflict with Arts. 52, 203, 210 of the Constitution.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

R. Lyons Attorney for Plaintiff and Appellant.

Farrar, Jonas & Kruttschnitt Attorneys for Defendants and Appellees.

The opinion of the court was delivered by

MCENERY, J. The plaintiff tax collector proceeded by rule against defendants, under Sec. 54 of Act 55 of 1888, to compel them to deliver the personal property assessed and taxed to them. The rule was discharged and the tax collector has appealed.

The defences to the rule are:

1. That the assessment of shares to the shareholders is made in block, and not individually to the shareholders.

2. That the appointment of an attorney at law to aid the tax collector is null and void, being in violation of Articles 52, 210, 203 of the Constitution of the State.

The first point has been disposed of in the case of Castles vs. City of New Orleans, just decided.

On the second ground the defence to the rule is equally untenable. Article 52 of the Constitution says: "The General Assembly shall have no power to increase the expense of any office by appointing assistant officials."

The answer to this is that the attorney appointed to bring suit for the tax collector is not an assistant to that official.

Section 54 of said act authorizes the tax collector to proceed by rule in a summary manner against the delinquent tax-payer when he can not make a seizure of the personal property assessed because of its nature, or when the tax-payer controls the property in such a manner that he can not "lay hands upon it."

The employment of an attorney at law to institute and prosecute the proceedings is a necessity. His duties are not such as to make him an assistant tax collector any more than the clerks employed in the tax collector's office constitute them assistant tax collectors.

Article 208 of the Constitution relates only to the equality of taxation. Article 210 declares that there shall be no forfeiture of property for non-payment of taxes, and provides that the collector shall sell the property assessed without suit. The proceedings authorized by the Act 85 of 1888 in no way violates this article, as the authorized proceeding is not against the property for the purpose of provoking a practical sale, but against it and the tax-debtor to compel its delivery, so that the tax collector can dispose of it as authorized by said article of the Constitution.

The judgment appealed from is therefore annulled, avoided and reversed, and it is now ordered that the sale be made absolute, as prayed for, the defendants in rule to pay costs.

Rehearing refused.

No. 11,385.

JAMES MCCONNELL, JR., VS. BENJAMIN ORY ET AL.

In the suit for slander of title if the defendant sets up title, he changes the character of the action. It becomes a suit to try titles in which the burden of proof to maintain title is on defendant as in the petitory action. 11 La. 187; 27 An. 613; 35 An. 355; 4 An. 90.

The party who promises to lend money required by the applicant for the loan to redeem his property from a tax sale will not be permitted, after that promise and the faith it inspires acted on by the applicant, to redeem from the tax sale and acquire that property for himself. Bigelow on Estoppel, Chap. 19.

APPEAL from the Civil District Court, Parish of Orleans.
King, J.

F. E. Rainold and *Chas. F. Claiborne* Attorneys for Plaintiff and Appellant:

In an action for slander of title, defendant who answers, setting up title, assumes the position of plaintiff in a petitory action, and must recover on the strength of his own title.

The State, having acquired nothing from the sales absolutely null, could transfer no rights. Breaux vs. Negrotto, 43 An. 433.

The sales to the State were null—

(a) Because notice was not given the delinquent tax-payers. La. Const., Art. 210; Breaux vs. Negrotto, 43 An. 433.

(b) Because the assessment of the property was insufficient for identification. Agusti vs. Lawless, 45 An. 1370.

(c) Because no plan was referred to in the assessment. Bell vs. Taylor, 37 An. 57.

Where an agreement has been made to lend money on mortgage on a particular piece of property, for the express purpose of paying the taxes due upon the same, a relation of the trust is established between the parties, and the lender is estopped to set up against the borrower a tax title which he has acquired subsequent to the agreement.

E. E. Moise and *B. R. Forman* Attorneys for Defendants and Appellees:

The deeds are *prima facie* valid. Const., Art. 210; Act No. 42, 1871; Const. of 1868, Art. 118; 43 An. 730; Act No. 77 of 1880; Act No. 96 of 1882.

The plaintiff having two remedies, which are mutually inconsistent, adopting one repudiates the other.

An action for slander of title, damages and annulment of defendant's title is the action at bar.

This repudiates the action of the principal against the agent to disgorge, since it negatives the agent's acquisition.

The denial of the validity of the title repudiated the agency—a plaintiff can not have one action in his pleadings and another in his brief.

The action is possessory and petitory.

It shall be presumed the possessory has been relinquished to resort to the petitory. C. P. 150.

Possession is not and never was in plaintiff.

Tradition or delivery of immovables accompanies the public act. R. C. C. 2479.

An authentic act is not an authenticated signature to a private act. R. C. C. *(passim)* 2253.

The State acquired. Defendant can not impeach what the State does with its own. 26 An. 701; 27 An. 238; 43 An. 878.

The description is better than the one held good in Smith vs. City, 43 An. 734, 726.

Informalities. 45 An. 485.

The opinion of the court was delivered by

MILLER, J. In this suit plaintiff sues for slander of title, and to annul a tax title to the property involved in the controversy, asserted by one of the defendants. The plaintiff derives title by purchase in 1894 from Julia C. Roe, widow of John Green, and she acquired it in 1871; the property being described as a portion of ground consisting of five lots, numbered from fifty-six to sixty, on upper side of State street in Bloomingdale; the numbers and measurements of the lots according to the plan of Bloomingdale. Besides this title, the plaintiff alleges, as a ground of recovery, that defendants are estopped from disputing his ownership.

The defendant Ory answered, alleging that he had purchased from the State, for account of his co-defendant, the property in controversy, the property having been, the answer alleges, forfeited both for State and city taxes, and sold to the city as well as the State for unpaid taxes. The sale from the State relied on by defendants in their answers are by deed dated 16th of May, 1892, from the State Auditor for the unpaid taxes of 1881, 1882 and 1883. The other defendant, Dowers, answered, averring the purchase for his account by the auditor's deed, and asserting in his defence the ownership of the property under that deed. In both answers the estoppel pleaded by plaintiff was denied. After these answers the defendant excepted on the ground of misjoinder of the demands made in plaintiff's petition, and required plaintiff to elect the cause of action on which he stood. The exception was overruled. Thereafter the defendants pleaded prescription in aid of the tax title asserted by them, and the forfeitures of the property prior to plaintiff's purchase, for non-payment of the taxes, city and State, assessed against Widow

Green, the author of plaintiff's title. The answer of each defendant claimed damages of plaintiff for the matter alleged in the petition as constituting the estoppel urged against defendant.

The judgment of the lower court was against the plaintiff, and against defendants on their demands for damages. The case is here only on plaintiff's appeal.

It was unnecessary for plaintiff asserting title from Widow Green to demand the annulling of the tax deed to one of defendants. If plaintiff's title was sustained, the tax title of course failed. The petition substantially presented the issue of plaintiff's ownership, involving the considerations of the tax title. In this view defendant's exception of misjoinder, even if in time, was properly overruled, and we do not appreciate that any importance is attached to it in this court by the defendants.

The action of jactitation does not ordinarily try titles to property. Its object is to quiet possession. It demands of defendant a disclaimer or an avowal of the slander. If disclaimed, the purpose of the law is attained and the suit ends. If the slander is admitted, then the defendant is ordered to bring suit to maintain his asserted title, and with that decree the jactitation suit terminates. If, however, the defendant sets up a better title in himself, that issue changes the character of the action. The whole object of the suit being to compel a disclaimer, or that defendant shall sue to establish the ownership he asserts, if defendant in his defence avers title, the court proceeds to determine that issue. It would be idle to order the defendant to institute another suit to establish title, when by his answer he tenders that issue. Nor does it make any difference that the defendant does not pray for judgment recognizing his ownership. It is enough that in the jactitation suit his defence is title. There can then, be no question that this suit for slander of title has become, by defendant's pleading, a suit to try titles; and, although in our view not at all important in this controversy, it is equally plain that in the changed character of the action the defendant assumes the burden in respect to proof, of the plaintiff in the petitory action. Proctor vs. Richardson, 11 La., p. 187; Bidwell vs. Cavaroc, 27 An. 307; Dalton vs. Wickliffe, 35 An. 355; Packwood vs. Dorsey, 4 An. 90.

The plaintiff's title is, as stated, derived from Widow Green. The asserted title of defendant Dowers is based on the tax assessment

against her. Plaintiff and defendant thus claim under a common author. In our view it is unnecessary to consider the questions discussed at the bar in reference to defendant's tax title, as to the sufficiency of the assessment in respect to the description of the property, nor whether notice of the tax sale was given.

The decision of this controversy is in our opinion controlled by the estoppel pleaded by plaintiff. The plaintiff's purchase of the five lots in controversy was on the 13th April, 1892; the price paid was four hundred dollars, and besides plaintiff assumed all the unpaid taxes. For some of these taxes there had been forfeitures and a tax sale to the City, and a tax sale to the State for the taxes for 1881, 1882 and 1883. Of course, without payment of these taxes and a relinquishment of the tax adjudications to the State and city, the plaintiff's purchase was ineffective. The plaintiff testifies that in this condition, within a day or two after his purchase, he applied to the defendant Ory, a part of whose business it is to lend money, for a loan of five hundred dollars to pay these taxes.

The plaintiff stated to Ory substantially, that the money was required to pay the taxes on five lots on State street, adjoining Mr. Ricker's house, on the woods side, purchased from Mrs. Green, and the plaintiff adds in testifying, that he remembers with distinctness the situation of the property was communicated. Ory answered he would lend the money if the title was good. The plaintiff further testifies, he allowed some days to elapse without completing the loan promised, and of course without paying the taxes. But while the plaintiff was thus waiting on the reliance that the loan would be forthcoming when he called for it, Ory effected the purchase of the lots from the State for his own account, or rather for his clerk, Dowers, in whose name the auditor's deed was made of date 16th of May, 1892. We have given careful attention to the issue of fact, whether as testified by plaintiff the communication stated by him was made to Ory, and that he promised the loan. If this proposition of fact is maintained, we think the legal principle clear that determines the controversy.

The plaintiff's testimony is clear and positive. With his mind intent on securing the loan to pay the taxes on which his title depended, it is natural that the communication and Ory's promise should have been impressed on plaintiff's memory. Was there any room for mistake as to the property on which the loan was desired?

Mr. Ory testifies, he thought the property intended was a part of the ten lots on State street, known as the Bundy lots, claimed by plaintiff under a tax title, and besides involved in litigation. Ory knew all about the Bundy lots, the tax title and the litigation. He states he supposed plaintiff might have acquired another besides his tax title. But if he had supposed the loan was desired on these Bundy lots, it seems natural he would at once have declined the loan, for he testifies, he does not lend on tax titles; or if he had thought plaintiff had acquired another title it seems singular that believing, as he testifies, the loan was sought on the Bundy lots, he should not have asked some questions as to the title. Again, he testifies, after the application for the loan on five lots on State street, he asked as to their location. Why the question if he supposed the five were part of the Bundy lots, with the location of which he was acquainted? There would seem to be nothing in plaintiff's application to borrow on five lots bought on State street, adjoining or near Ricker's, that would suggest they were part of these Bundy lots, on which, in the then condition known to Ory, no one could expect to borrow, still less anybody who would lend. That Ory could have derived the impression the Bundy lots were to be subject of the loan is utterly unaccountable, too, if, as the plaintiff testifies, he stated the loan was desired on five lots he had "purchased a day or two since from Mrs. Green." The examination of Ory's testimony, in its entirety, conveys the impression his memory of facts and impressions is not accurate. Indeed, at the outset he states he is a busy man and can not remember small details. Again, he testifies the only thing of which he is absolutely conscious, is that plaintiff did not deliver his title or state the lots he owned, and never mentioned the numbers fifty-six to sixty. He does testify emphatically, he had no suspicion that lots fifty-six to sixty had been bought, and if he had had that suspicion he would have stopped all researches that ultimately led him to make the purchase. But he does not controvert in his testimony the plaintiff's statement that the loan was asked on five lots on State street, or that it was communicated that the lots were near or adjoining Ricker's, nor that the loan was promised. To our minds the variance, if variance it can be termed, in the testimony of Ory and that of plaintiff is unimportant. The plaintiff adds the circumstance, not stated by Ory that the name of the author of plaintiff's title, Mrs. Green, was also communicated. On the

question of details it is human experience and the rule of law is that testimony affirmative in its character prevails over negative testimony. Philips on Evidence; 2 An. 1006.

In this view we deem the testimony of plaintiff more reliable. Dowers testifies, he does not profess to have heard all that passed, and his testimony does not materially affect the issue. It is our conclusion the communications as detailed by plaintiff were made, and if not to the full extent he testifies, enough was certainly conveyed to Mr. Ory to afford him reasonable cause to know when he paid the taxes and bought, in the name of his clerk, five lots on the upper side of State street, near Ricker's, and assessed in the name of Mrs. Green, that he was undertaking to acquire the same property on which he had agreed to loan the plaintiff. Allowance is to be made for Ory's testimony that he had not the least suspicion of the identity of the property. One part of his testimony seems to concede, if he had had the knowledge he disclaims, he could not have made the purchase. He surely knew enough, as we think, to make him pause. If he had paused all doubt on the point of identity would have been resolved. It often happens that what is said of importance to appreciate and remember, leaves no fixed impression. According to his testimony that was the case with Ory. All that we decide is, that plaintiff's communications were of a nature and in substance and detail sufficient, to convey to Mr. Ory that impression he states he did not derive as to the identity of plaintiff's lots with those Ory bought from the auditor, or at least were enough to suggest the strong probability that when he bought five State street lots near Rickers, for taxes assessed equal to Mrs. Green's, he was buying the same lots on which he agreed to lend the plaintiff. On any question arising on the acts or conduct of a party affecting another's interest, that which the party has reason to know or suspect is equivalent to actual knowledge.

On the faith of the promise of Ory to lend on the five lots plaintiff acted and had a right to rely. If Ory's purchase is maintained, then by reason of that reliance plaintiff loses the property, and the money he paid for it. Ory would be the gainer. Instead of being the lender of the money promised on the mortgage of plaintiff's property, Ory would own that property for the taxes plaintiff had expected to pay with the money Ory had promised. The result, so disastrous to plaintiff and advantageous to Ory, would be due entirely to the

confidence, utterly disappointed, which plaintiff reposed in Ory's promise. The legal principle readily suggests itself that precludes such a result. It is urged on us that Ory at the time of plaintiff's application for the loan was investigating tax sales of property on State street with a view to purchases, and plaintiff's application should not, it is suggested, have the effect of disabling Ory from making these purchases. If he had desired freedom of action in this matter, he should have declined the application. Plaintiff would then have sought the money elsewhere. But surely, Ory could not promise the money plaintiff needed to secure his title and then take steps for his own benefit, which, if successful, utterly defeated plaintiff's title. The argument for the defence, also lays stress on the delay of plaintiff in calling for the promised loan. Plaintiff was not as prompt as he might have been. But he evidently, acting on his reliance that the loan would be forthcoming when called for, did not appreciate the necessity of immediate action. He must have been very prompt to have protected himself, for within a month and a day or two after the promise of Ory he had taken all necessary steps and secured the tax deed for himself, We do not think Ory's obligation arising from his promise is subject to the measure of time suggested to us in this connection.

The estoppel arises against the party on whose acts or conduct another has acted or relied in a matter affecting his interest, and he against whom the estoppel is asserted, will not be permitted to set up any right or title inconsistent with his acts or conduct, and prejudicial to him who has acted on the faith created by such acts or conduct. All the elements of the estoppel, we think, are present in this case, forbid the defence of title asserted by defendants and uphold that of plaintiff. Bigelow on Estoppel, 19th chapter.

We think the justice of the case requires plaintiff should be decreed to be the owner of the property on reimbursing the taxes paid by Ory.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, in so far as it dismisses the plaintiff's suit, be avoided and reversed; the plaintiff is hereby recognized and decreed to be the owner of the five lots of ground on upper side of State street, numbered 56 to 60, according to the original plan of Bloomingdale, and acquired by him from Widow Green by act of date the 13th of April, 1892; it is further decreed that defendant

Dowers relinquish in favor of plaintiff, by authentic act, within ten days from the filing of the mandate in the lower court, the tax title asserted by him to the property under the auditor's deed, of date 16th of May, 1892; but this decree is not to be operative unless plaintiff, on the execution and filing in court of the copy of such act of relinquishment, pay to defendant, or deposit in court for him, the amount of all the taxes, city and State, on said property, and the attendant charges of redeeming said property paid by defendant, with legal interest on the amount so paid by defendant from the dates of said payments; the amount of this reimbursement to defendants to be ascertained, if necessary, by proper proceedings in the lower court; and it is further adjudged that defendants pay costs in both courts.

Rehearing refused.

No. 11,417.

ALEXANDER LICHTENTAG VS. TAX COLLECTOR ET AL.

46 572
52 226

A school-house in which stenography and typewriting are exclusively taught is not exempt from taxation by Article 207 of the Constitution.

The proviso in said article excludes from its benefits schools that are conducted for private profit.

APPEAL from the Civil District Court, Parish of Orleans. *King, J.*

W. B. Spencer and *Fenner, Henderson & Fenner* Attorneys for Plaintiff and Appellee:

The words "colleges or other school purposes," as used in the Art. 207 of the Constitution, include in their scope and meaning all places where a mental training in arts, sciences, or letters is given, and a place where stenography is taught is therefore a school within the meaning of the words. 35 N. W. Rep. 222.

In determining the question whether property or buildings are exclusively used for school purposes within the meaning of the article, the test is not merely the relative amounts of space occupied for family and school purposes, but the surrounding circumstances of fact must also be regarded, and duly appreciated. Blackman vs. Tax Collector, 39 An. 592.

It is the use to which the property is put, and not the use to which the income derived therefrom is put, that should be regarded in determining the question of exemption *vel non*. Richmond Co. vs. Bohler, 7 S. E. Rep. 635; 19 Ohio, 114, 115, and cases therein cited; 35 An. 668.

So that where the property is directly and immediately used for school purposes, it makes no difference, so far as the question of exemption is concerned, whether the income is devoted to school or to private purposes. Nelson vs. Stryker, 53 N. W. Rep. 1134.

Private schools, under the Constitution, are exempt from taxation.

The fact that tuition is received by the conductor of such school does not bring it within the meaning and purpose of the proviso of Art. 207 of the Constitution.

E. A. O'Sullivan, City Attorney, *Henry Renshaw*, Assistant City Attorney, for Defendants and Appellants:

The burden is upon plaintiff to show his right to exemption from taxation, and such right must be established beyond doubt. 43 An. 1108; 42 An. 1102, 1121; 41 An. 998; 34 An. 956.

Property used to live in, and to conduct "a school of stenography and typewriting," is not exempt from taxation. Constitution of La., Art. 207; Cooley on Cons. Lim., pp. 73 and 74.

Even if the character of plaintiff's establishment exempted it from taxation (which, however, is denied), plaintiff's property is used for purposes of private profit or income, and is consequently liable to taxation. Constitution, Art. 207; 22 N. E. Rep. 845; and in this connection, 12 S. W. Rep. 933.

The opinion of the court was delivered by

McENERY, J. The plaintiff is the owner of lot seven in square one hundred and fifty-one, bounded by Robin, Magazine, Camp and Race streets, in the city of New Orleans, and alleges that he is conducting a school of stenography and typewriting, which is the only means by which he obtains a livelihood, and that the above described property is used by him exclusively for the purpose of living in and of conducting said school, and that under the Constitution of the State said property is exempt from taxation.

On the prayer of his petition he obtained an injunction restraining the Tax Collector of the Fourth District, the Board of Assessors and the city of New Orleans from advertising or attempting to sell the above described property for the taxes assessed against it.

There was judgment for plaintiff as prayed for and the defendant appealed.

Art. 207 of the Constitution of 1879 is the only provision of the Constitution applicable to the present controversy.

It says property used exclusively for colleges or other school purposes shall be exempt from taxation, provided it is not used or leased for purposes of private profit or revenue.

The word school as employed in the above article is used in the ordinary meaning of the word, and must therefore be applied to the class of institutions which are embraced within that meaning. In its most extensive signification it embraces places where learned men meet for instruction and intercourse, where they may discuss or promulgate ideas of a particular and individual character and promote the dissemination of a particular theory. It embraces the learned of a particular profession when associated for special purposes, such as the college of surgeons; and it as applied to describe an assemblage of a particular kind, or the followers of a particular teacher in theology, science, philosophy or medicine. It certainly in the Constitution applies to none of these, but is used for the purpose of describing ordinary schools, such as we know in common speech—educational establishments below the grade of college in which elementary knowledge is imparted. Such institutions are for the purpose of instructing young children, and are known as primary or common schools or academies. Such institutions are for acquiring knowledge and mental training.

Plaintiff's evidence shows that the teaching of typewriting and stenography is made part of the instruction of schools and colleges, and is a means of mental training. But this fact would not constitute these mechanical arts as the means of acquiring general knowledge and mental training.

Boxing, fencing, dancing, in fact all of gymnastic exercises, instruction in which forms a part of the course in many institutions of a high grade, in some degree train the mental as well as the physical condition, but they are not for this reason the necessary accompaniments of education. Painting is one of the most instructive of the arts,

yet no one will contend that a building in which painting is exclusively taught is exempt from taxation. Music also is instructive, and develops to a high degree certain of the mental faculties, and like painting promotes the vigor of the imagination, and strengthens the reasoning faculty. They are both taught in all well established schools and colleges, yet no building devoted exclusively to the teaching of these arts would be exempt from taxation, for the reason that they do not necessarily enter into every scheme of general knowledge, and are not essential to the training of the mental faculties.

Stenography is an art—shorthand writing, the use of abbreviations or characters for whole words. Typewriting can scarcely rank as an art, and may be classed as a mechanical occupation, like the setting of type. Neither one of these occupations enter into a scheme of education for the acquisition of knowledge or the training of the mental faculties. That they incidentally improve some faculty can not be disputed; that they may have a healthy influence on all the faculties may be admitted, but many mechanical occupations do the same thing. It is difficult to conceive of any exercise of the physical powers without in some degree exercising a wholesome influence on the mental faculties.

The occupation of the plaintiff, which he is teaching to his pupils, presupposes an acquisition of knowledge and a mental training, and the object of the school is not for the purpose intended by the primary or common school or academy. It is the teaching of a trade which the pupils expect to follow for a livelihood.

Schools for lawyers and doctors, exclusively devoted to the preparing of them for their profession, presuppose a previously acquired fitness, and they enter into no general plan of common education. The school buildings for these purposes are not exempt, as they are intended for a special class, for special purposes of professional calling. And so it is with plaintiff's school. It is intended to educate a particular class, for a special object and for a specific calling, in an occupation by which to make their way in life. The institution presupposes all that is required for such a calling has been obtained in some school or college devoted to the purpose of imparting knowledge and mental training.

The petition of plaintiff alleges that his school is conducted by him for private profit. Article 207, in the proviso, excludes such schools from the exemption.

The judgment appealed from is annulled and reversed, and it is now ordered that plaintiff's suit be dismissed with costs.

Rehearing refused.

46 576
47 715

No. 11,406.

DINKELSPIEL'S SONS VS. THE NEW ALBANY WOOLEN MILLS.

An affidavit by the attorney for plaintiff, that from information received from the parties affiant believes the allegations in the petition to be true and correct, the petition stating the debt and all other requisites, is equivalent to swearing to the knowledge and belief of the affiant. The law does not exact that the word "knowledge" shall be used, but is satisfied if an equivalent is employed, and information received, believed to be true, is knowledge. Code of Practice, Articles 216, 244.

APPEAL from the Civil District Court, Parish of Orleans.
Theard, J.

Dinkelspiel & Hart Attorneys for Plaintiffs and Appellants.

F. L. Richardson Attorney for Defendants and Appellees.

The opinion of the court was delivered by

MILLER, J. This appeal is from the judgment of the lower court dissolving, for a supposed defect in the affidavit, the attachment of defendant's property.

The debt for which the attachment issued and the non-residence of defendants are set forth in the petition, and the affidavit for the writ made by the attorney for the plaintiff is, in substance, that from information received from the parties interested in the suit he believes the allegations in the petition to be true and correct. The defect suggested in the affidavit is that the attorney has sworn to his belief, but not to his knowledge, and it is claimed the law requires the affidavit both to knowledge and belief.

The affidavit is that from information received from the parties in interest affiant believes the allegations in the petition to be true and correct. Information received and believed to be true is knowledge. It is precisely the knowledge and all the knowledge the agent or attorney as a general rule possesses. In a more general sense,

it may be said that knowledge is merely derived from information. The affidavit then must be deemed to embody the knowledge of the affiant. The word itself is not used, but that which constitutes knowledge is distinctly stated and embraced in the affidavit. The code does not exact that the identical words used in it shall be inserted in the affidavit. If the affiant uses language equivalent to that of the code, the law is satisfied. We think, therefore, it would be hypercritical to hold an affidavit insufficient because information received and believed is substituted for the word knowledge. If the word knowledge had been incorporated in the affidavit it would have expressed no more than the affidavit expresses. Code of Practice, Arts. 216, 244.

The earlier decisions quoted in plaintiff's brief held that an affidavit to the best of the affiant's knowledge satisfied the code, for knowledge, said the court, comprised belief. The court discarded, as not essential, the precise language of the code, and accepted knowledge as the equivalent of belief. The other decisions held the affidavit insufficient because the affiant deposed only he believed defendant indebted. Belief, said the court, did not embrace knowledge. The distinction made by the learned Chief Justice who pronounced these earlier decisions, that knowledge includes belief but belief does not imply knowledge, may not be deemed entirely clear, but it is not perceived how either or both these decisions tend to show any defect in the affidavit in this case, combining as it does both knowledge and belief. 1 Martin N. S. 98; 7 N. S. 610.

It is clear, under our law, the defendant may bond and then move to dissolve the attachment, but our decision of the sufficiency of the affidavit is enough to dispose of the case.

It is therefore adjudged and decreed that the judgment of the lower court be avoided, annulled and reversed, and that plaintiff's attachment and plaintiff's suit be and are hereby reinstated, the costs of the appeal and of the lower court to be paid by appellee.

Rehearing refused.

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No. 11,320.

THE STATE VS. A. P. DUPAQUIER.

1. The ordinance of the city of New Orleans requiring (under penalties in case of refusal) vendors of milk to the public to furnish gratuitously on application of sanitary inspectors samples of milk not exceeding one-half pint for inspec

tion and analysis is not unconstitutional as forcing dairymen to furnish evidence against themselves, as taking private property for public use without compensation and without due process of law, as depriving them and their property of the equal protection of the law, and denying them protection in person and property from unreasonable searches and seizures and authorizing invasion of the same, without warrant founded on oath or affirmation.

2. The ordinance is not unreasonable, vexation and oppressive, but a legitimate exercise of the police power for the public health.

APPEAL from the Second Recorder's Court of the City of New Orleans. *De La Bretonne, J.*

Frank McGloin for Plaintiff and Appellee:

The Federal Constitution is primarily a check upon Federal power; it exercises no restraint upon the sovereign powers of the States, except in so far as this latter effect is clearly provided for, in the instrument itself. United States vs. Cruikshanks, 92 U. S. 550, 551, 552; Morgan vs. Louisiana Board of Health, 118 U. S. 467; State vs. Brennan, 50 N. W. Rep. 625; *Ex parte* McNeely, 36 W. Va. 881, 32 Am. St. Rep. 831.

The provisions of the Federal Constitution forbidding unreasonable searches and seizures, and prohibiting the taking of private property for public purposes, without compensation made, do not affect State legislation; same authorities.

The provisions of the Louisiana Constitution prohibiting the forcing of persons to testify against themselves, and forbidding searches and seizures for procurement of evidence against the owner or possessor in a criminal process, do not apply in prosecutions for violations of mere municipal police ordinances. Dillon, Mun. Corp., Sec. 432; 2 La. 442; 4 An. 337; 35 An. 1192; 42 An. 272; 42 An 1112; 43 An. 836; 45 A. 717.

The ordinance of the City of New Orleans requiring milk vendors to give to sanitary inspectors a sample of their milk, does not authorize the inspector to take, against the will of the vendor, such sample, and it therefore does not provide for a seizure, as contemplated by the Constitution, nor does it make the failure to furnish a sample a confession of guilt, and it is not compelling a man to testify against himself.

This ordinance, if in any way involving a matter of evidence, is intended to secure proofs of innocence, and not of guilt. 32 Am. St. Rep. 643.

If considered a seizure, it is not unreasonable, and only unreasonable seizures are forbidden. Comm. vs. Watts, 84 Ky. 537.

The City of New Orleans has full authority to prevent the sale within its limits of adulterated milk, or foods unfit for human consumption. State vs. Labatut, 39 An. 514; State vs. Callac, 45 An. 29; State vs. Fourcade, 13 S. R. 187. See also State vs. Schlemmer, 42 An. 1167, where a baker was fined *for failing to fill up a well*, upon his premises, *at his own cost.*

A proper system or method of inspection is necessary to the carrying out of this power, and is implied in the grant to prevent sale of adulterated food and drink. Parker and Worthington on Public Health and Safety, Sec. 311; Dillon on Municipal Corporations, Sec. 390 (323), Ed. 1890; Cooley, Cons. Lim. 596; State vs. Fosdick, 21 An. 256; Clark vs. Board, 30 An. 1353.

Inspection may be precedent to privilege of selling or subsequent. In former case, the legal penalty is ordinarily for selling uninspected or uncertified wares. In the latter, the vendor may sell, but is bound to submit to examination on demand of the officers of the law. Parker and Worthington on Public Health and Safety, Sec. 304; Comm. vs. Carter, 132 Mass. 12. It is impossible to safely use precedent inspection, in the case of milk, to be sold in varying quantities to a number and variety of purchasers.

Sellers of milk are not entitled to trade free from all public control. The city has the authority to license them, and when they accept such license, and sell free from precedent inspection, their relations with the public are in the nature of contractual, and they can not refuse to comply with reasonable ordinances regulating the calling they are pursuing. Guillotte vs. City, 12 An. 432; Comm. vs. Carter, 132 Mass. 15; Pitkin vs. Springfield, 112 Mass. 509; Bertholf vs. O'Reilly, 74 N. Y. 509, 117; State vs. Davis, 32 Am. Rep, 640.

Persons pursuing a calling in which the public health is involved deal in wares in which the public has an interest as well as themselves, and, to the extent necessary for the securing of the rights of the public in the premises, they can be compelled to submit to efficient inspection. State vs. Davis, 32 Am. St. Rep. 640.

The trifling loss to the vendors of milk, imposed by the ordinance attacked, is a cost of inspection proper, and as such imposed justly upon the owner of the property to be inspected. Turner vs. Maryland, 107 U. S. 38; Morgan vs. Board of Health, 118 U. S. 466; State vs. Fosdick, 21 An. 258; Clark vs. Board of Health, 30 An. 1353. See also C. C. & A. R. R. vs. Gibbes, 12 Sup. Ct. Rep. 257.

Jas. C. Walker Attorney for Defendant and Appellant:

The several sections of City Ordinance No. 6596, C. S., approved August 2, 1892, are connected and interdependent; they fix a standard below which milk shall be deemed adulterated; the chemical test by means of which this adulteration shall be determined, and require that every dairyman shall, under penalty of fine and imprisonment, furnish gratuitously, as often as the health officers demand it, half pint samples of milk, to be subjected to such analysis, as means of proof to convict themselves of selling, or offering for sale, milk inferior in quality to the established standard.

A fine or sentence is unconstitutional when imposed by a city ordinance which prescribes means of proof forbidden by the Constitution.

The ordinance conflicts with Louisiana Constitution, Articles 2 and 6; United States Constitution, Amendments IV, V, and XIV, and with Acts Louisiana, 1880, No. 20, p. 23, and 1882, No. 82, p. 103, and is unconstitutional for the following reasons:

The ordinance deprives dairymen of their milk without compensation, at the discretion of municipal officers, and without uniform rule or regulation.

It compels dairymen to be witnesses against themselves and to furnish samples of milk to be used as evidence against themselves, under penalty of fine and imprisonment.

It denies to dairymen the equal protection of the laws.

It denies them protection in the enjoyment of their property.

The ordinance denies them protection in person and property against unreasonable searches and seizures, and authorizes the invasion of the same without warrant founded on oath or affirmation.

It subjects them to an odious, oppressive and unreasonable exaction which interferes with their vocation, which is lawful and industrial, and not injurious to the community.

The ordinance deprives dairymen of their property and liberty without due process of law.

The ordinance establishes a rule of evidence and mode of proof legislative in character, and makes the same conclusive evidence against parties accused thereunder.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant having been sentenced to pay a fine of twenty-five dollars, and in default of twenty-five dollars to suffer imprisonment for thirty days, on the charge of refusing, in violation of Ordinance No. 6576, of the city of New Orleans, approved August 2, 1892, to furnish the officers of the Board of Health with samples of the milk he was supplying to his customers, has appealed.

The constitutionality of the ordinance was attacked on several grounds by special plea in the magistrate's court, and a bill of exceptions reserved to the overruling of the same.

The ordinance violated is as follows:

"SECTION 1. Be it ordained by the Common Council of the City of New Orleans, that the standard by which the adulteration of milk shall be considered to be such milk as shall be determined under Ordinance No. 6022, as adopted June, 1879, shall be as follows: Normal or pure milk shall be considered to be such milk as will, upon the test thereof, be found to possess a minimum specific gravity, actual density, of one thousand and twenty-nine (1.029) at sixty (60° F.) degrees Fahrenheit, and shall contain not less than thirteen (13) parts of total solids in one hundred parts of milk, as follows: Butter fat, three and one-half (3½) per centum; solids not fat, nine and one-half (9½) per centum; and water, not more than eighty-seven (87) per centum.

"SEC. 2. Be it ordained, etc., that any milk falling below the test above described, or any milk from which the cream has been removed, or to which water, foreign fats, coloring matter, or any other foreign or extraneous substance has been added, shall be considered as adulterated under said ordinance.

"SEC. 3. Be it ordained, etc., that every vendor, or establishment, or person, who sell milk shall be obliged to furnish to any sanitary officer or inspector of the Board of Health of the State for inspection and analysis, on application therefor, a sample of the milk

sold by said vendor, or establishment, or person, from the can or other vessel from which it is sold to the public; said sample shall not exceed one-half pint, and there shall be no charge therefor.

"SEC. 4. Be it ordained, etc., that any person who shall be found guilty of selling milk below the standard hereinbefore fixed or otherwise adulterated or modified as provided under section two of this ordinance, or refusing to furnish samples as hereinbefore provided, shall be subject to a fine of not more than twenty-five dollars for each and every offence, and in default of payment thereof, to imprisonment in the parish prison for a period of not over thirty days; said fine or imprisonment to be enforced by any court of competent jurisdiction within the corporate limits of the city of New Orleans."

Appellant contends:

1. That the ordinance deprives dairymen of their milk without compensation and without uniform rule or regulation.

2. It compels dairymen to be witnesses against themselves and to furnish samples of milk to be used as evidence against themselves under penalty of fine or imprisonment.

3. It denies them the equal protection of the law.

4. It denies them protection in the enjoyment of their property.

5. It denies them protection in person and property against unreasonable searches and seizures, and authorizes the invasion of the same without warrant founded on oath or affirmation.

6. It subjects them to an odious, oppressive and unreasonable exaction which interferes with their vocation, which is lawful and industrial and not injurious to the community.

7. It deprives dairymen of their property without due process of law.

8. It establishes a rule of evidence and mode of proof legislative in its character and makes the same conclusive evidence against parties accused thereunder.

His counsel additionally maintains that the ordinance is not within the scope of the police power of the city; that considered as a health law it bears no substantial relation thereto; that it delegates arbitrary power to health officers without restraint or uniform rule or regulation.

We think that the objection raised to the ordinance in question as establishing a rule of evidence is not an issue in this case. Defendant was not on trial for having sold adulterated milk, and there-

fore no question arose in the lower court upon the admissibility or effect of evidence against him based upon an analysis made from a sample of milk taken from him under protest or by compulsion under the provisions of the ordinance.

We find in Tiedman's "Limitations of the Police Power" a note on page 292, to the effect that the Legislature has the power, in an act forbidding the sale of impure or adulterated milk, to fix a standard by which it shall be judged, and as supporting this proposition the following citation of authorities: People vs. Cipperly, Ct. Ap., N. Y., February 5, 1886; State vs. Smythe, 14 R. I. 100 (51 Am. Rep., p. 344); Commonwealth vs. Waite, 9 Allen, 264; Commonwealth vs. Farren, 9 Allen, 489; Polenskie vs. People, 73 N. Y. 65.

In State vs. Fourcade (45 An., p. 717) we held that under the powers delegated to the city of New Orleans on the subject of the regulation of the milk traffic the City Council had the legal right to adopt a standard.

Referring to the adoption of a standard, Parker and Worthington, in their work on Public Health and Safety, say, in Sec. 301: "In some of the States the statutes on this subject provide that in all prosecutions under the act, if it be shown upon analysis that the milk sold or offered for sale contained more than a certain percentage of watery fluids, it shall be deemed, for the purposes of the act, to be adulterated. These provisions are valid, as they merely regulate and control the quality of an article of food in the interest of the public health, and fix a standard of quality. The clause does not establish a rule of evidence to the prejudice of the accused, but creates and defines a new offence. It is the purpose of the statutes to prohibit, not merely the dealing in milk which has been adulterated, but also the dealing in milk of such inferior quality as to fall below the standard required," citing numerous authorities.

We will postpone a discussion of the correctness of these statements until a case comes before us in which the rights of the appellant are claimed to have been illegally affected through the ordinance as "a rule of evidence."

Most of the questions raised in this litigation were directly passed upon in the case of Commonwealth vs. Carter, 132 Mass. 12, from which we shall quote freely later on, and the whole subject of the regulation of the milk traffic is discussed in Parker and Worthington's Public Health and Safety, on pages 345 to 349, under the sections from

299 to 304. The last section (Sec. 304) is as follows: "It is said milk dealers may be required to supply from time to time samples of milk to milk inspectors for analysis, and the inspectors may be authorized to take samples for that purpose and to condemn and pour upon the ground, or return to the person who supplied to the dealer, any milk which upon inspection he finds to be adulterated, or below the prescribed standard. Shivers vs. Newton, 45 N. J. L. 469; Blazier vs. Miller, 10 Hun. 435."

The question of the general powers of the city of New Orleans over the subject of the regulation of the sale of milk within its limits has been several times presented to and passed upon by this court.

The present suit does not involve an issue upon the general power, but upon the special application of the power as attempted to be made through the ordinance whose constitutionality, upon the specific grounds urged, is herein attacked.

We do not think the attack upon the ordinance, on the ground that it forces a man to furnish evidence against himself, is well taken.

On this point plaintiff's counsel in his brief contends as follows: "The object of the ordinance was not to secure evidence against violation of the law, but simply to secure means for proper examination of the milk which is being sold upon the public streets and places to inhabitants of New Orleans. The milk can not possibly be produced before the courts, being necessarily destroyed by the very chemical process for which the ordinance provides. No law can prevent the chemist of the Board of Health from chemically analyzing the milk which vendors are selling and from testifying to the result of the analysis. Whether the sample analyzed was acquired by purchase or seizure would render the effect of the chemist's testimony neither more favorable or unfavorable to the one accused. The object of the ordinance is rather, if it can be considered, as contemplating the furnishing of evidence, the obtainance of satisfactory evidence of the vendor's innocence than of his guilt. State vs. Davis, 108 Mo. 666 (18 S. W. Rep. 894). In this instance the municipal authorities have licensed the vendors to sell and waived inspection previous to the taking out of the wares, and as a precaution to the end of ascertaining that the privilege given is not being abused requires the vendors when occasionally called upon to furnish a trifling sample from their stock. This is emphatically to gather assurance of their good faith and right to continue in the

calling they are pursuing, and not for the purpose of extorting evidence against wrong-doers. It was not presumed the vendors were intending to violate the law; it is not to be presumed that the present appellant has declined to give a sample in this case, because of the fear that his milk would be found to be adulterated had the samples been furnished. If the original seizure or taking had been justifiable, the fact that it is possible that the thing may serve to subsequently fasten criminal guilt upon the possessor can not render the taking unlawful. Langdon vs. People, 133 Ill. 381. Indeed, the courts have held that even though the original taking were a trespass, the results of the taking were admissible in evidence. Gindrat vs. People, 27 N. E. 1085."

"That the city having a right to license the selling of milk and the parties having availed themselves of that privilege, under the conditions stated the wares they sell become property in which the public has an interest. It is that public interest alone in the foods generally sold which justifies the public examination of private property. If the public have such interest in the wares of this character to be disposed of to them, that same public have a corresponding right of access to such wares to the extent necessary for the preservation of their rights or interests. The milk sold by the milkmen in the city of New Orleans, therefore, is public property as well as private to the extent that the public have the right to effectively provide for its purity and to that end to view and analyze it."

In Commonwealth vs. Carter, 132 Mass. 12, the Supreme Court held that a statute of that State authorizing inspectors of milk to enter all carriages used in the conveyance of milk, and whenever they have reason to believe any milk found therein is adulterated to take specimens thereof for the purpose of analyzing or otherwise satisfactorily testing the same, was constitutional.

Taking up the particular objection we are now considering, it said: "Neither is the power granted in violation of the provisions of Art. 12 of the Declaration of Rights, that no man shall be compelled to give evidence against himself. If the seizure is such as is authorized by the Constitution, and a law passed in pursuance thereof, the fact that the thing seized may be used in evidence against the person from whose possession it is taken does not render the seizure itself a violation of the Declaration of Rights." 2 Met. 329, 337.

In State vs. Davis, reported in 18 S. W. Rep. 894, the Supreme Court of Missouri held that statutes of that State prohibiting a druggist from selling liquor except on the prescription of a physician, and declaring that such prescriptions shall be carefully preserved and produced in court or before any grand jury whenever required, and that on the failure of the druggist to produce the same he shall be deemed guilty of a misdemeanor, were not in conflict with the article of the Constitution providing that no person shall be required to furnish evidence in a criminal case against himself.

Referring to the claim that they were, the court said: "We think not. The right to sell intoxicating liquor is not a right or privilege accorded to every citizen. The State has the right to control, regulate or altogether prohibit its sale. It has, therefore, the undoubted right to impose such conditions upon those whom it may authorize to sell such liquors as it may deem necessary to properly regulate and control its use (Austin vs. State, 10 Mo. 591). Druggists are not given an unlimited right to sell intoxicating liquors. * * * There can be no doubt that the Legislature had the right to impose its own conditions in authorizing such sales. It undertook to do so by the provisions of Section 4621, which limits sales to those made under the written prescription of a regularly registered and practising physician."

"To prevent abuse of their authority to sell as a covering under which to make unlawful sales, Sec. 4622 requires the druggist to preserve all such prescriptions and produce them in court or before the grand jury when lawfully required. This duty was imposed as a condition upon which a sale was authorized. The prescriptions thus become the license or justification to the druggist for making sales which would otherwise be unlawful. As evidence of authority to make particular sales they would constitute private papers of the druggist, but could not be regarded as evidences of crime but rather of innocence. The chief purpose of their preservation, however, was evidently that they might be used in giving aid to courts and grand juries in their proper and lawful endeavors to control and regulate the sale of intoxicating liquors within the limits prescribed by the Legislature, and in the investigation of matters of public concern. In these respects all the prescriptions become public and not private papers, and the druggist merely their custodian. It could not be insisted that the production of the official books of a collector, treas-

urer or other public officer could not be required in the investigation of his accounts or used in evidence against him in a prosecution for official misconduct. The obvious reason is that the books are not the private property of the citizen, but the public records required to be kept by the officer. The law imposing the duty upon druggists of preserving the prescriptions of physicians left with them, and of producing them before the grand jury, is as clearly required as the duty imposed by law upon any public officer to keep an account of the public money which passes through his hands. Our conclusion is that Sec. 4622 is constitutional, and all its requirements may be lawfully enforced."

This decision was referred to in State vs. Davis, 23 S. W. Rep., 759, and the principle enunciated therein was reaffirmed.

We do not think that the objections urged by appellant to the ordinance, that it deprives him of the equal protection of the law; that it denies him protection in the enjoyment of his property; that it denies him protection in person and property against unreasonable searches and seizures, and authorizes the invasion of the same without warrant, founded on oath or affirmation, and that it deprives him of property and liberty without due process of law, are well founded.

Defendant has selected as a business one which, improperly conducted in the hands of unscruplous men, would seriously affect the health of the public.

It is no longer a debatable question whether callings of that character can be legally brought under reasonable restraints and regulations through the exercise of the police power. The object of the ordinance in question is to protect the general public against dishonest vendors of milk; its effect will be not only not to injure appellant, but to protect him as a member of the public from that class of persons, and incidentally to save him as an honest vendor in that business from injurious competition through fraudulent devices and ill practices. Honest vendors could certainly see nothing to flow from the ordinance but proper and beneficial results—they certainly should raise no complaint at having their own actions brought to a test when in so doing they purge the business of disreputable characters.

We do not think the ordinance was beyond the scope of the police power of the city, nor that considered as a health ordinance it bears no substantial relation thereto.

We are of the opinion that in delegating to the Common Council the powers it did, the Legislature contemplated that it would adopt a reasonable system to render the power effective. We agree with plaintiff's counsel that a reasonable method of inspection of the milk offered for sale to the public falls legitimately under the grant of power. There are two methods of inspection. The first is to compel the vendor to exhibit the articles he proposes to dispose of to a public officer, as a condition precedent to their sale, but inasmuch as there are certain cases where the prior inspection would fail of accomplishing the purpose, by reason of the facility offered for subsequently tampering with the goods inspected, a second system is often had recourse to. Under this system the vendor is permitted to proceed with his sales without prior inspection, but with the obligation to submit his commodity to inspectors when the latter think it necessary to demand an examination. The penalty is laid upon the sale, not of uninspected wares, but of improper ones. We are of the opinion that the liability at any moment to a call for inspection, together with the dread of the penalty following detection, operates strongly by way of prevention against the perpetration of frauds, and, as counsel well says, "are the most effective of checks against the sale of adulterated food, and the object of the law otherwise unattainable is accomplished."

We have already referred to the case of Commonwealth vs. Carter, 132 Mass. 12., as presenting issues almost identical with those presented here in respect to statute closely resembling the ordinance we are now considering. In that case the court said: "It is said that the provision is unconstitutional, because it authorizes the taking of property without consent or compensation, warrants unreasonable searches and seizures, compels one to furnish evidence against himself and is not within the police power of the commonwealth. An analysis of a specimen of milk offered for sale is an appropriate means of carrying into effect the various provisions of the statutes regulating the sale of milk in this commonwealth. In the case at bar the can of milk was taken from a carriage used in the conveyance of milk, and it is unnecessary to consider whether the words of the section, 'place where milk is stored or kept for sale,' may or may not include a dwelling house, and whether if construed to include a dwelling house they do not purport to give a power which the Legislature could not give, because the clause authorizing an

entry is separable from that which authorizes an entry into all carriages used in the conveyance of milk.

"If the statute had required that all milk offered for sale should first be inspected it would be hardly contended that the trifling injury to property occasioned by taking samples for inspection would be such a taking of private property for public use as to require that compensation be made therefor. Such an injury to property is a necessary incident to the enforcement of reasonable regulations affecting trade in food. Private property is held subject to the exercise of such public rights, for the common benefit, and in the case of licensed dealers in merchandise the injury suffered by inspection is accompanied by advantages which must be regarded as a sufficient compensation. Bancroft vs. Cambridge, 126 Mass. 438, 441. Instead of requiring all milk offered for sale to be first inspected, the Legislature, for obvious reasons, has permitted licensed dealers to sell milk without inspection, has imposed penalties for selling adulterated milk, and has provided that when the inspector of milk has reason to believe that any milk may be adulterated he may take specimens thereof in order that by analysis he may determine whether the milk has been adulterated. Such a seizure of milk, for the purpose of examination, is a reasonable method of inspection, and does not require a warrant. It is a supervision, under the laws of the State, by a public officer of a trade which concerns the public health, and it is within the police power of the commonwealth. Commonwealth vs. Ducey, 126 Mass. 269; Jones vs. Root, 6 Gray, 435.

"There is nothing in this case which requires us to determine the rights of the defendant if the inspector had attempted to take a larger quantity of milk for analysis than was reasonably necessary for the performance of his duties. We have not found it necessary to consider whether the defendant by voluntarily accepting a license to sell milk has not assented to the conditions and regulations which the Legislature has seen fit to impose upon the exercise of the trade licensed. See Pitkin vs. Springfield, 112 Mass. 509; Bertholf vs. O'Reily, 74 N. Y. 509, 517."

Appellant complains that the ordinance is vexatious and oppressive, in that the inspectors are subjected to no special and uniform rules to control and govern their action. He claims that it opens the door to favoritism and to the gratification of personal spite and

prejudice; that the inspectors may harass the vendors of milk by unnecessary and repeated demands for samples. The mere fact that powers under an ordinance may be abused does not make the ordinance itself illegal, unreasonable or oppressive; it is very difficult to so hedge in power conferred as to withdraw from it opportunities for wrong-doing. If such wrong-doing as appellant anticipates were to occur, we think that there are ample remedies at hand to correct and punish it. In the case at bar the efficacy of the inspection rests to a great extent upon the very uncertainty as to the times and places of inspection of which counsel complains. It would be an easy matter to prepare for inspections when parties knew in advance precisely when and where they were to be made.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment appealed from be and it is now affirmed.

Rehearing refused.

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No. 11,280.

ALICE A. ZEREGA ET AL. VS. JOHN PERCIVAL.

1. The law not having designated the particular place in which the date must be put in an olographic will, it may be placed at the head, at the foot, or in the body of the instrument.
2. A demand in nullity of a testament, on the ground of captation and suggestion, is barred by the provisions of Art. 1492 of the Revised Civil Code.
3. An action in nullity of a testament, on the ground that it was obtained by means of the ascendancy acquired by the legatee over the testatrix, in his character as a minister of religious worship, while in attendance upon her during the illness of which she died, is barred by the provisions of Arts. 1489 and 1492 of the Revised Civil Code. Further averment is necessary if the legatee is the husband of the testatrix, that he married her in fraud of the law, or with the fraudulent design of defeating the incapacity established by law.

APPEAL from the Civil District Court, Parish of Orleans.
Theard, J

Farrar, Jonas & Kruttschitt, J. C. Gilmore and *Marshal Gasquet* Attorneys for the Plaintiffs and Appellants:

The question is *res nova* in this State and this court is at liberty to settle it on principle.

There is a profound and logical reason for excepting blood relations, and not husbands, from the provisions of Art. 1489, C. C.

The policy of the civil law is that property shall follow blood and not affinity.

The husband is not the heir of the wife nor the wife of the husband, except by irregular succession. The wife excludes only the State. The remotest blood relation, even a natural child acknowledged, excludes the husband from the wife's estate.

Therefore, in testamentary matters, are they put on the footing of mere strangers to each other.

Art. 909, C. N., is the substantial foundation for Art. 1489, C. C., but the latter departs from the former in several respects.

The article of the C. C. is limited to physicians and surgeons. The French article includes "health officers and pharmacists." The one makes exception of all persons connected by blood. The other excepts blood relations within the fourth degree, and then only where the testator had no heirs in the direct line, unless the legatee was himself one of such heirs. It thus appears that the compilers of the Code of Louisiana have not merely copied the French article, but have profoundly modified it.

It has been held that where the marriage takes place during the illness of which the wife dies, and she is at that time the patient of the doctor who marries her, he is incapable of being her universal legatee. Gile de Han vs. Regel, Cour Royale de Paris, 25 Fevrier, 1817, J. du P., Vol. 14, p. 92. It is contended the allegations of the plaintiffs bring them exactly within the doctrine of this case; if not specific enough to establish a general case of fraudulent captation, they are sufficiently broad to enable plaintiffs to prove that the testamentary disposition in favor of the defendant was the outcome of his ministerial influence, and not of conjugal affection.

Art. 1489 of our Civil Code is to be strictly construed. The doctor or minister of religious worship who marries the sick person whom he has attended during her last illness is precluded from receiving from the decedent donations *inter vivos* or *mortis causa*.

Art. 1489 establishes a special incapacity.

Art. 1492 prohibits proof of the dispositions being made through hatred, anger, pure and simple unadulterated suggestion and captation, but it does not prohibit proof of fraudulent suggestion and captation.

The intention of a testatrix to make a universal disposition will not be deemed absolute where the will, on its face, exposes a lack of exercise of voluntary testamentary intention, and contains no date as a last will and testament.

The date in the context of the testament will not be deemed to refer to the will, but to the universal disposition, and can not be deemed as the placing of the date of the will within the meaning of a date as one of the forms required by law for an olographic testamen·.

The writing, date and signature are intrinsic elements (of form) of an olographic will, as are also the voluntary intention and the capacity of the parties, testatrix and instituted heir and universal legatee.

In a suit to annul a will for fraud and lack of voluntary intention of the testator, date and incapacity of the universal legatee, arising under Art. 1489 (1476) Revised Civil Code, Art. 1492 (1488), prescribing that proof shall not be admitted of the disposition having been made through hatred, anger, suggestion and captation, will not apply as an exception to evidence or cause of action.

Article 1489 (1476), establishing an incapacity against clergymen, in certain cases, applies to the relation of husband and wife, in reference to nullity of a universal disposition by the wife to a clergyman, the husband, who has attended his wife in the exercise of his calling in illness of which she died.

Estoppel will not lie against a party contesting a will as legal heir, who has brought a suit to recover her own interest in furnitnre and movable property held by the executor, universal legatee, in possession under the will, when she afterward sues for the absolute nullity of the will.

In a case where the will contains no other disposition but the universal legacy to the husband and the appointment of the husband as executor, and the husband has been placed in possession under a judgment recognizing him as universal legatee and instituted heir, the testament will be set aside in entirety, as indistinguishable from a single illegal disposition *mortis causa*, in contravention of Art. 1489 (1476), R. C. C. Citing Coin d'Lisle, pp. 319-320, Chap. V, preceding Art. 967; Art. 970, pp. 333-345, No. 30, 348, 318-320, 439; note, pp. 9, 10, 84, 85, 88,

89; Demolombe, Vol. 21, p. 54; Don. and Test. 4, pp. 487, 438, 132-133, No. 156-162, pp. 169-170; Laurent, Vol. 13, Don. and Test., pp. 170, 190, 199, 200, 218, 224, 229, 333, 335; Demolombe, pp. 503-549, 344, 345; Laurent, Vol. 2, 464, No. 339, 484-564; Laurent, Vol. 11, No. 353; Coin d'Lisle, pp. 320-321; Coin d'Lisle, p. 320, pronounces the date "intrinsic;" Laurent, Don. and Test., Vol. 13, pp. 183-184; Coin d'Lisle, Don. and Test., p. 86; Hebert vs. Winn, 24 An. 385; Baudry Lacantierie, Vol. 2, 393; Pandectes Francaises, Don. et Test. 1717; see also Hebert vs. Winn, 24 An. p. 385, in our favor on this point of proof, and citation of Jarman on Wills—invoked by counsel for defendant; Troplong, Don. and Test., Vol. 2, p. 72, Sec. 491; Burke case, 35 An. pp. 163-179; Winn case, 24 An. p. 385; Ed. 1865, Micheaux Des Testaments, pp. 29, 30, 45, 46, 82, 92, Sec. 670, pp. 425, 276; Delvincourt, Vol. 37, 41-42; Troplong, Vol. 2, Don. and Test., 68, 75; Laurent, pp. 171, 228-242, 224, 191-201 (Vol. 13, Don. and Test.); Demolombe, Vol. 21; Zachariæ, Vol. 5, p. 29; Pothier, Don. and Test., Vol. 10, p. 533; Demolombe, 1, p. 347; Troplong, Vol. 1, Sec. 2, 488, p. 238; pp. 69-72, Sec. 488, 495; Poujol, Don. and Test., Vol. 2, p. 16, No. 4; Boileau, p. 489, Art. 909, C. N.; Ker on Fraud and Mistake, pp 193-195 and citations; Schouler on Wills.

In Dalloz we find innumerable opinions. Here are the following for refere ce:

On the question of fraudulent suggestion and captation: Dalloz, Vol. 5, Verb. Don. Dis., pp. 240, 288, 294, 291.

Two last decisions on the Article 909, C. N.—a fraudulent manœuvre. On fraudulent suggestion and captation: Dalloz, 1826, 1st part, p. 391; Dalloz, 1830, 1st part, p. 84; Dalloz, 1837, 1st part, p. 193; Dalloz, 1842, 1st part, p. 428; Dalloz, 1833, 2d part, p. 36; Zachariæ, D. C., Vol. 5, pp. 28 and 29: Boileau, Vol. 3, pp. 469, 495, note; Guillion Traite de Donations, Vol. 1, p. 136; Delvincourt C. C., Vol. 4, pp. 37-42.

The legacy made by a wife to her husband, who was at the same time her doctor, was declared null and void—for the reason that he had treated and cared for her professionally before her marriage and during the sickness of which she was ailing, at the time of her marriage, and of which she afterward died.

Delvincourt is already of the opinion that the incapacity existing before the marriage, to receive testamentary dispositions, can not be avoided by a subsequent marriage.

The Court of Cassation so decided that the incapacity existing at the time of the marriage could not be covered by the marriage. Delvincourt C. C., Vol. 4, p. 42.

The Court Royale, of Paris, decided conclusively and in terminis the same way in regard to same doctrine, by judgment and decrees of the 24th February, 1817. Sirey, 1818 (2d part, p. 354), also January 26, 1818 (2d part, p. 360).

These different prohibitions have been pleaded in the code in order to circumvent and prevent frauds which might be perpetrated on weak persons. Troplong, p. 69.

Cassat, 21st December, 1841, Devill, 43, 1, 51. Those are the same as the principles of the Louisiana Code. Proof of simple captation is not admitted, but when fraud is connected, or a party to it, annuls a testament. Art. 1492.

Proof of hatred, suggestion and captation.

Correct, but where fraud is connected with suggestion and captatation, proof of the same must be admitted. Micheaux de Testaments, p. 29.

Carleton Hunt Attorney for Defendant and Appellee:

When an olographic last will and testament is entirely written, dated and signed by the hand of the testatrix, it is a complete and perfect instrument The olograph is subject to no other form. The insertion by the testatrix, before signing, of the words "the whole written, dated and signed by me personally," affects in no way the validity of such a testament. 5 An. 278; 27 An. 269; Coin de l'Isle, Don. and Test., Art. 970, No. 80, Vol. 1, p. 343; Zachariæ, Droit Civil Francais, Note 22, Sec. 668, p. 490, Vol. 5; 1571, 1588; Demolombe, Donations et Testaments, Vol. 1, No. 56; Rogron, Art. 970, Codes Annotés, Marcade, Ed. 52, Vol. 4, pp. 6, 7, 8, 9; Duranton, Vol. 9, pp. 30, 31, Nos. 31, 32; Ed. 34, Zachariæ, Vol. 5, Sec. 688, p. 488 *et seq.* Dalloz, Codes Annotés, p. 783, Nos. 146, 166, 151; 3 Toullier, No. 369, p. 103; Brussels Ed. of 1837.

The charge of suggestion and captation is tantamount to what is understood elsewhere by undue influence. Fraud and undue influence are nearly synonymous. By the terms of Art. 1492 proof is not admitted of testamentary dispositions having been made through hatred, anger, suggestion or captation. 9 La. 458; 35 An. 161; 1 Redfield on Wills, Star., pp. 512, 514; Bouvier Law Dict., verbis captation and suggestion; Coin de l'Isle, Art. 901, Code Civil, Vol. 15, No. 16, p. 852; Demolombe, Don. and Test., Vol. 1, pp. 410, 411, No. 384; Bédarride des Dol et de la Fraude, Vol. 1, pp. 392, 393, 389.

Art. 1492, C. C., is copied from Art. 18, p. 212 of the Code of 1808, known as the Digest of the Civil Law. Art. 18 was proposed in the shape of an article in the projet for the Civil Code of France, but was rejected. The framers of the Code of 1808 had before them the discussion on the projet. The public policy which was rejected in France prevailed in Louisiana. The law as formulated in Art. 18, Code 1808, and Art. 1492, R. C. C., has always remained in force in this State. Locré, Legislation Civile, Vol. 1, Chap. 6, pp. 71, 72, 73.

When a case, being an action in nullity of an olographic testament, on account of captation and suggestion and undue influence, comes on for trial; and the defendant immediately raises the objection that under Art. 1492, R. C. C., proof is inadmissible, and that the petition is vague, and wanting in all proper specifications and particularization of time and place and circumstances, and the trial court sustains the objection in question; and plaintiffs obtain leave to amend and supplement, and proceed to do so; and the defendant takes a rule to strike out the amended and supplemental petition, and the rule is discharged; but the trial judge reserves to defendant the right to except thereafter to the amended supplemental petition, if the same does not disclose sufficient ground of action, and either under the general issue or by peremptory exception; and thereupon defendant, having not only pleaded the exception of no cause of action, but having repeated the same at the proper time, files his answer; and the case is regularly fixed and comes on for trial a second time.

It is the right of the defendant to assume that plaintiff has set forth his case as completely as he can; and it is then competent for

defendant to argue and have passed upon him by the trial court, his exception of no cause of action, and additional peremptory exceptions, and especially the exception going to the foundation of the action, that the plaintiff's petitions are wanting in the particulars and specifications required by law for an action in nullity of a will on the ground of fraud and violence. It is bad practice to refer such exceptions to the merits. C. P. 343-6; 18 An. 643; 19 An. 207; 21 An. 500; 31 An. 680; 38 An. 232, 526; C. C. 1851; Hennen's Dig., pp. 1114-1147; 6 Martin, 510; 7 An. 238-241; Coin de l'Isle, Code Civil, L. III, T. II, p. 86, No. 21; Grenier, Don. and Test., Vol. 1, p. 428, No. 149; Merlin, Rep. Mot. Suggestion 81, No. 2; Toullier, No. 5, 713; Bédarride, Vol. 1, No. 399.

Properly understood, Art. 1492, R. C. C., is also a bar to the allegation of the petition and to the intervention herein, that nullity of the testatrix's testamentary disposition in favor of the defendant results from the ascendancy acquired by him over her in his character of a minister of religious worship in attendance upon her during the illness of which she died. Art. 1492, R. C. C., is to be construed with Art. 1489, R. C. C. The jurisprudence is well established that the provisions of Art. 1489 are entirely without application to the relation of husband and wife. Art. 909, C. N., and Art. 1489, R. C. C., correspond; Art. 1489 is to be construed with Arts. 119 and 1749, R. C. C.; Art. 119, R. C. C., is the same with Art. 212, C. N.; Arts. 1749, R. C. C. and 1096, C. N., correspond; Art. 1091, C. N., and Art. 1736, R. C. C., correspond, and so do Art. 1094, C. N., and Art. 1739, R. C. C.; Demolombe, Don. and Test., Vol. 1, p. 566, No. 543, and authorities therein cited; Marcade, Art. 909, C. N., p. 423, No. 111; Laurent, Don. and Test., Vol. 11, p. 484, No. 353; Ray vs. Broisin, Cassation, 1808; 7 Journal du Palais, p. 121; Bonnet vs. Desordes; 15 Jour. du Palais, 1820, p. 688; Desordes & Guyot vs. Bonnet, 14 Jour. du Palais, 1817, 1818, p. 592; Boyer vs. Damiens de Beaufort, Jour. du Palais, 1819, 1820, p. 580; Demolombe, Don. et Test., Vol. 1, p. 569, No. 545, giving numerous authorities.

The action of an intervenor, who joins plaintiff in a suit in nullity of a testament, is barred if he has already sued the defendant for a partition to enforce a division of property which is held jointly

by the intervenor and the defendant in the character of instituted heir under the testament attacked. R. C. C. 1330; Mayor vs. Armant, 14 An. 181.

The opinion of the court was delivered by

WATKINS, J. This is an action for the revocation and annulment of the will of *Martha Vaughan Gasquet*, deceased wife of the defendant, instituted by her two survivng sisters and one niece, as heirs at law—it being alleged that the deceased was married to the defendant on the 16th of December, 1886, and departed this life on the 11th of October, 1891, leaving neither ascendants nor descendants.

The will is olographic in form, and was admitted to probate on the 14th of October, 1891. It is couched in the following terms, to-wit:

"In the name of God, the Holy Trinity, Amen:

"I, Martha Vaughan Gasquet Percival, in view of the uncertainty of human life, do make this my last will and testament in holographic form.

"I give, will and bequeath all the property of whatever kind, real and personal, movable and immovable; all moneys, assets and effects which I may possess or own, or have any claim on or interest in at the time of my death, to the Rev. John Percival, my husband. I make him my sole heir, and give to him, my said husband, immediate and unconditional seizin of my whole estate at my decease.

"This is my good and valid will and testament, and I now revoke and declare to be null and void any and every other will and testament heretofore made by me.

"This done in the city of New Orleans, State of Louisiana, this Tuesday, the ninth day of July, in the year of our Lord 1889.

"The whole written, dated and signed by me personally.

"MARTHA VAUGHAN GASQUET PERCIVAL."

Under the decree of the presiding judge the defendant was recognized as universal legatee under the terms of the testament and invested with possession of the decedent's succession.

The grounds of attack set out in the plaintiff's petition are substantially of the following purport, to-wit:

First. That the testament is not clothed with the formalities required by law for such an instrument, in that it is not properly dated.

Second. That it was not the voluntary act of the deceased, and was

not made the repository of her intentions, because same was procured by means of undue influence exercised by the defendant in his own favor, and with the view of supplanting her legal heirs.

To this petition the defendant for answer plead a general denial, accompanied with the special defence that the charge of undue influence made against him is an unjust and slanderous charge; and the averment is made that the will is complete and perfect in every essential particular and valid in form.

Upon these issues, a trial of the cause was begun, and testimony was being introduced on the behalf of the plaintiffs when the defendant's counsel objected thereto on the ground that the charge of undue influence was tantamount to that of *captation* and *suggestion*, proof of which is inadmissible under Art. 1492 of the Civil Code. This objection was sustained on the ground that such allegations were insufficient to authorize the introduction of proof under them, same being unaccompanied with *specific* charges or facts of fraudulent practices.

Thereupon the trial was continued on the issue remaining—that is to say, upon the alleged informality of the testament. Thereupon the plaintiffs filed a supplemental petition, with the evident purpose of supplying the defects of their original petition.

In this supplemental petition the plaintiffs make quite an elaborate statement of the various acts and facts of *fraudulent* captation charged, and among them the following, to-wit:

"That the defendant was at the time of his marriage with testatrix and since, professionally attending her as a minister of religious worship during her sickness of the malady with which she died, to-wit: tuberculous consumption, and the legacy which the defendant had obtained from his sick wife, instead of proceeding from conjugal affection, was the result of the abuse of the ascendancy which he had obtained over her in the exercise of his calling; that notwithstanding their said marriage, defendant employed unlawful power over his wife's testamentary intentions to defeat her will and to perpetuate the pretended will which he had procured from her at his dictation; that the said Mrs. Percival was fraudulently prevailed upon and coerced by the defendant to leave him her said estate under fear of threats and violence, and in her weak condition of health she was subjected to constant surveillance and restraint up to her last moments, to such an extent as to deprive her of and destroy

her testamentary capacity; that the will was not left in the keeping of decedent, where she could have access to it, and that she was prevented by every means from exercising her volition as to her testamentary intentions in any manner, or revoking the said instrument, which had been obtained from her by illegal and fraudulent means and had never expressed her true and final intentions."

About this juncture of time a change occurred in the *personnel* of the judges of the District Court, whereby the judge who presided when the proceedings outlined above occurred, was displaced by the judge who conducted the subsequent pro eedings to final judgment and appeal. Subsequent to this change, defendant filed the following peremptory exceptions, to-wit:

1. That the plaintiffs' petition and the intervention herein being petitions in nullity of the testament of exceptor's wife in favor of exceptor on the ground of defect in the form thereof as an olographic will, and especially as not having been dated by the testatrix, because of the situation in the testament of the date and of the manner of indicating the same, can not be maintained.

2. That the plaintiffs' petition and the intervention herein being petitions in nullity of said testament on the ground of captation and suggestion are barred by Article 1492, R. C. C.

3. That plaintiffs' petition and the intervention herein being petitions in nullity of said testament, as a disposition obtained by means of the ascendancy acquired by him over the testatrix, in his character as minister of religious worship, in attendance upon the illness of which she died, are likewise barred by Article 1492 and Article 1489, R. C. C.

4. That plaintiffs' petition and the intervention herein being petitions in nullity of the testament of exceptor's wife, and charging fraud on exceptor, and fraudulent coercion on his part, in obtaining and the obtaining of said testament under fear of threats and violence, are vague and indefinite and wanting in any and all proper specification of time, place and circumstance.

5. That the intervention herein is barred by the judicial confession of intervenor, Miss Frances Gasquet, who has sued exceptor for a partition.

On motion of defendant's counsel, these exceptions were at once taken up for trial, because they were peremptory in character, and the same were sustained and the suit dismissed, and from the judgment of dismissal the plaintiffs have appealed.

I.

The preliminary question to be decided is whether the district judge correctly disposed of the exceptions at the *time* he did, or should he have deferred his decision until he decided the merits of the cause.

It is apparent, upon simple inspection, that the exceptions pleaded are of a peremptory character, and founded on the law, and for that reason pleadable during the progress of the trial, which had, however, just begun.

The purport of the exceptions is, first, that the charges preferred are barred and precluded by the terms of Arts. 1489 and 1492 of the Civil Code; and second, that the charges of *fraudulent* coercion are too vague and indefi ite, and so wholly wanting in specification of time, place and circumstance as to render all proof under them inadmissible.

Manifestly these objections were so general and sweeping as to require action on the part of the court at the very outstart, as they appeared at the threshold of the controversy. If, indeed, the matters set out in the petition and amended petition are barred by the law, and for that reason not actionable at all, the judge *a quo* was, by the exception of defendant, charged to determine and decide that question preliminarily. And if in fact the allegations of the petition are too vague, and proof was inadmissible thereunder, certainly the judge was bound to pass upo ı that question, when the objection was urged against ; he admissibility of proffered testimony.

The law provides that "peremptory exceptions founded on law are those which, without going into the merits, show that the plaintiff can not maintain his action," etc. C. P. 345.

Such exceptions "may be pleaded in every stage of the action previous to definitive judgment," etc. C. P. 346.

In Jennings vs. Vickers, 31 An. 679, it was held that "an exception which, if maintained, will terminate the suit, ought to be tried and decided *in limine*."

In Farmer vs. Hafley, 38 An. 232, the court said that it was bad practice to refer to the merits, exceptions which go to the foundation of the action.

Such, indeed, is the settled jurisprudence of this court, and it has been established in the interest of a correct and economical adminis-

tration of justice. Certainly no reason can be assigned why the trial and final disposition of an exception that may put an end to the case should be deferred to the final trial of the cause, thus inflicting additional cost and expensive delay on the litigants and protracting litigation unnecessarily.

We not only approve, but applaud the action of the district judge in taking up and disposing of the exceptions during the progress of the trial, for if they are maintained in this court, this litigation will be terminated.

II.

First, in order of occurrence as well as in importance of result, if maintained, is the exception that the allegation of nullity of the will for want of form can not be maintained, the averment being, substantially, that it is not dated, and is, therefore, lacking an essential element for its validity.

As the objection, if it be well founded, is plainly and easily discoverable on the *face* of the instrument, it presents a naked qu stion of law as to whether the terms of the will in this respect constitute a *date* in the sense of the code. Presented in this light this objection is the equivalent of the plea of no cause of acti n, and peremptory in character and determinable *in limine*.

The concluding portion of the testament is couched in the following terms, viz.:

"This is my good and valid will and testament, and I now revoke and declare to be null and void any and every other will and testament heretofore made by me.

"This done in the city of New Orleans, State of Louisiana, this Tuesday, the 9th of July, in the year of our Lord, 1889.

"The whole written, dated and signed by me, *personally*.

"MARTHA VAUGHAN GASQUET PERCIVAL."

The question raised by the defendant's exception is, whether the terms of the instrument are responsive to the terms of the law, to-wit:

"The olographic testament is that which is written by the test tor himself.

"In order to be valid, it must be entirely written, *dated* and signed by the hand of the testator. It is subject to no other form," etc. R. C. C. 1588.

The contention of the plaintiffs is, that the will has no date within the meaning of the law; and their counsel propound this question, to-wit:

"How can we, therefore, be called upon to supply this date *by appropriating a date out of the body of the will*, as a date required by law, which it lacks? and, not having a date, how can we accept this instrument as a solemn act of last will and testament, gifted to speak out after death with 'most miraculous organ.'"

A careful perusal of this interrogatory discloses the objection of plaintiffs to be, that the date is defective and illegal, because of its being *in the body* of the testament—exceptants not doubting that the testament was wholly *written* by the testatrix herself, as the following quotation from their brief will attest:

"The impression left on the mind by reading for the first time this will, in the original, is not only that it is not dated, but that it is not the personal act of the testator, although indisputably, *we presume*, *in her handwriting*.

"The perusal completed, the mind vaguely inquires for the date at the end of the will—and then recurs to the top of the instrument in search of it, and the envelope; then, on further consideration, reverts to *date in the body of the instrument;* during which time the conviction that it is a solemn act of last will and testament is suspended, if not lost, and can not be said to resume moral consciousness in the enunciation in the words 'this * * * by me, *personally*,' which no testator would think to add to the evidence of hi own handwriting in the entirety of the instrument; or then to underscore as done, except to expose the intervention of a foreign hand."

But this course of argument is a clear departure from the text of plaintiff's exception in that it is not *solely* based upon the want of a proper date to the instrument, but is made to turn upon the alleged impression that is created on the mind by the *absence of a date* that the *execution* of the will was not the personal act of the testatrix—an altogether different question from the one propounded, viz., that the date given is in the body of the will, and for that reason same is null and void.

Hence the inapplicability of the quotation counsel have made in support of that argument, viz.:

This court has said, in the case of the Succession of Bobb, 41 An. 250: "In interpretation of a will the first and natural impression

derived from reading the clause involved is entitled to great weight. The writer is not supposed to be propounding riddles, but rather to be trying to convey his idea in the simplest and most natural manner, so as to be correctly understood at first view."

And for like reason, we think, their reference to Succession of Morvant, 45 An. 208, equally inapplicable.

Neither of those cases involve the question we have here for consideration—the *date* of the testament.

As a confirmation of the statement that the date must be appropriated from the body of the will, the concluding paragraph is pointed to, viz.:

" The whole written, dated and signed by me, *personally*."

Given its literal meaning and interpretation, this sentence asserts the truth of the proposition plaintiff's petition denies; for it declares that "the whole"—that is the will—was "written, dated and signed" by the testatrix.

At most, this seems to be a mere repetition of the fact that is made evident by the paragraph immediately preceding it, viz.: " This done * * * this Tuesday, the ninth day of July, in the year of our Lord 1889."

How this mere repetition of the fact that the testament *was dated* can be made to operate as a denial of that fact we can not perceive, unless it be upon the converse of the proposition, that two negatives equal an affirmative.

This *addendum*, occurring as it does after the actual date of the will, is restricted in terms to the declaration of the fact that it was written, dated and signed by the testatrix, and does not make reference to the disposing part of the instrument. It relates exclusively to the confection of the will, and constitutes no part of the body of it.

Per contra, the contention of the defendant's counsel is, that the law prescribes no particular place in the will where the date must be placed, and that, consequently, the date of an olographic testament may be either at the beginning or at the end, or in the body of the instrument itself, provided that it is fairly and plainly inferable from an inspection of the instrument; that it was the intention of the testator that it should have the date in question. He closes his argument on this question thus:

" Whether or not this be the case, must be made the subject of

judicial inquiry in every suit, where the issue has been properly joined and tried; but, whenever relations reciprocal, between the date of the testament and the bequests, are, reasonably speaking, made clear, the mere locality, or the exact situation of the date in the will, the instrument being otherwise valid, is matter of small, if indeed it is of any importance at all."

The district judge entertained the defendant's theory and expressed the following view in his reasons for judgment, viz.:

"Albeit Art. 1588, in stating that the olograph shall be written, dated and signed by the testator, is suggestive of the order to be observed in the preparation of the act, still, as the law has not prescribed in terms the place to be occupied by the date, it is immaterial where it is put. It may be at the beginning, at the end, or even in the context of the act. It may also follow the signature. 27 An. 271, Succession of Fuqua.

"But, in that case, it is for the court to decide whether the date is intended to apply to the testamentary dispositions, or whether it is so far from them as to exclude all idea of its being connected therewith. In the same manner, when the date is in the body of the instrument, the court must inquire whether the date refers to the dispositions which follow as well as to those which precede it, thus making the several parts of the instrument a continuous and congruous entity, or whether the subsequent dispositions are without date, and hence null. Prudence would, therefore, counsel a testator, anxious to place the execution of his last wishes beyond the uncertainty of litigation, to date the will immediately before signing it, but his failure to do so and the writing of the date in the body of the will would not be a cause of nullity. Such is the *consensus* of opinion among the French commentators on Art. 910, Napoleon Code, of which our Art. 1588 is a translation." Rogron, Code Napoleon Annoté, pp. 1001-1002; Marcadé, Ed. 1852, Vol. 4, pp. 6, 7, 8, 9, par. 12 *et seq.*; Zachariæ, Vol. 5, pp. 84-85, Sec. 688; Pothier, Obligations, Vol. 77, p. 277; Duranton, Vol. 9, pp. 30-31, Nos. 31-32; Toullier-Duvergier, Vol. 3, p. 205, No. 369; Dalloz, Vol. 1, Codes Annotés, No. 148, p. 783; Coin d'Lisle, Don. et Test., No. 2, p. 336, No. 30, p. 343.

The will under consideration in Succession of Fuqua, 27 An. 271—to which case the district judge referred—was first signed and then dated, thus:

"MRS. SARAH B. FUQUA.

"*September 12, 1873.*"

Of it the court said:

"We come now to consider whether the instrument above quoted is a will. We are of opinion that it is. It is in the olographic form; entirely written, dated and signed by the testatrix. Objection is made that the date is not affixed in the proper place. It is not essential that the date to an olographic will should precede the signature. It may be placed below. See Coin d'Lisle under Art. 970, Code Napoleon, No. 30, where the authorities on this point are cited."

The same proposition is quite as distinctly announced in Lagrave vs. Merle, 5 An. 278. In that case the will was dated at the beginning, and signed at the end, and of the complaint made of it the court said, viz.:

"The argument of counsel has been principally directed to the last clause, revoking all former wills, *which comes after the date given to the* closing part of the principal testamentary disposition. This, though in the handwriting of and signed by the testator, has no date appended to it," stating a case much stronger against the will than that stated by the plaintiffs. Of it the court said:

"The case turns on the consequence attending the posterior clause not being dated. The code provides, that for the validity of an olographic will, it must be written, dated and signed by the hand of the testator. It is subject to no other form, and may be made out of the State. Art. 1581. * * * The law not having fixed the place in which the date must be put in an olographic will, it may be placed not only at the head but also at the foot of the instrument and in the body of it.

"A date, though affixed to the first clause, and before the second, may be applied to one as well as to the other, and thus both may be considered as dated and signed. Droit Francais, Lib. 3, Tit. 2, Sec. 34 *et seq.*"

Hence it is quite clear that under the provisions of our own code, as well as under the Napoleon Code, and the jurisprudence of France as well as our own, that the particular position or place of the *date* of a will is not fixed or sacramental, and our conclusion is that the exception of the defendant is well taken, and that same was correctly maintained by the judge *a quo*.

III.

The *second* ground of exception is, that no evidence is admissible under the allegations of the plaintiffs' petition, wh ch are of the following tenor and effect, to-wit:

"That said Mrs. Percival was *fraudulently* prevailed upon and coerced by the defendant to leave him her said estate, under fear of threats and violence, and in her weak condition of health she was subjected to constant surveillance and restraint, up to her last moments, to such an extent as to deprive her of and destroy her testamentary capacity," etc.—the objection being that the charge of the petition is that of *captation and suggestion*, which is barred under the provisions of t e code.

The code declares that "proof is not admitted of the dispositions having been made through hatred, anger, suggestion or captation" (R. C. C. 1492 [1479]); and the argument of defendant's counsel is, that the allegation that the testatrix' testamentary capacity was destroyed by the persuasive power and coercion of the defendant, and by the constant surveillance and importunities of the defendant, up to her last moment, is, in effect, a charge of suggestion and captation in the sense of that article.

The learned judge of the District Court, in the course of his examination of this case, gave due attention to this question, and, in his reasons for judgment, employed the following language, which we adopt as our own, as the views expressed are both clear and forcible, viz.:

"Is undue influence a cause of a nullity of testaments? Undue influence is an expression unfamiliar to civilians. It is borrowed from a system of law not prevalent in Louisiana, and it is there used in the same sense as captation and suggestion in the civil law. Schouler on Wills, pp. 230, 231, Sec. 227.

"When, therefore, plaintiffs in their petition allege undue influence, they must be understood as alleging captation and suggestion. Captation has been defined as the act of one who succeeds in controlling the will of another, so as to become master of it. Captation takes place by those demonstrations of attachment and friendship, by those assiduous attentions, by those amenities, by those caresses, by those ready services, by those officious little presents, usual among friends, and by all those methods which, ordinarily, render us agreeable to others, and enable us to secure their good will. Suggestion is often used as a synonym for captation, but it is applied specially to those means of persuasion employed to alter the will of a testator, and to prompt him to make a disposition different from that which he had in view. Bouvier's Law Dictionary, verbo Captation; Furgole, Vol. 1, p. 131."

An examination of *Bouvier* fully attests the accuracy of the judge's definition; and as Abbott's Law Dictionary gives no definition whatever of the word *captation*, that of *Bouvier* is controlling.

Simplified, the question is, whether under the code it was permissible for the plaintiff to make proof of *undue influence* having been employed by the defendant in superinducing the testatrix to make the testament in his favor, for the purpose of procuring its annulment.

If the term "undue influence" comes within the meaning of the term "captation and suggestion," then the offered evidence came within the reach and prohibition of the cited article of the code.

When the case was first on trial, the judge then presiding held that an objection *then* taken to that effect was well grounded, and disallowed the testimony.

And, subsequently, the plaintiffs amended their petition and made the averment above quoted, of *fraud*, as having accompanied the undue influence exercised—doubtless with the object of meeting the views entertained by the judge then presiding; and which are as follows, viz.:

"Undoubtedly," said the judge, "undue influence is sufficient to annul a will, when it is proven that undue influences have operated; but undue influences must be indicated in the proceedings by specific acts of malpractice or fraudulent practice, and showing that the intention of the testator was thereby deceived, and that the disposition is therefore tainted with fraud"—his theory being that the plaintiff could overcome the prohibition of the code by making specific charges, or facts of fraudulent practices, in the employment of the "undue influence" used; or, in other word , the prohibition of the code is directed against *simple*, and not against *fraudulent* captation.

But, after the *personnel* of the District Court had been changed, the judge taking the bench subsequently entertained a different view—holding that the terms of the code are general, and not susceptible of the distinction his predecessor had given it. In the "reasons for judgment" the trial judge assigned, this question was carefully and comprehensively treated, and they are well worthy of reproduction. Said he:

"Art. 1492, R. C. C., provides that 'proof is not admitted of the dispositions having been made through hatred, anger, suggestion or captation.' The language of this article is plain and unambiguous,

and the rule of exclusion which it formulates would seem to admit of no exception. But counsel for plaintiffs, arguing in the same manner as my esteemed predecessor, contend that Art. 1492 is merely declaratory of what the jurisprudence was in France formerly, and what it was in the State of Louisiana at the time of its adoption, and that it prohibits the evidence of simple captation and suggestion, but does not embrace questions of fraudulent captation or fraudulent suggestion.

"When this argument was first addressed to me, impelled by a sense of deep respect for the great erudition and the ponderous logic of the magistrate by whom it was advanced, I was inclined to concede its soundness. Further reflection, however, and a careful and searching review of the French commentators have led me to a different opinion. I find that from time immemorial, under the ordinances and customs of Paris, captation and suggestion were causes of nullity of testamentary dispositions; but at no time was the nullity decreed, unless captation and suggesti n were accompanied by fraudulent practices capable of leading the testator into almost invincible error regarding those in whose favor he wished to make his will. The reason was that, albeit the kindly offices, th e cajolery, the flattery, the presents, and the many other demonstrations of feigned friendship usually resorted to by cupidity, are repugnant to honesty and good conscience; still human laws have not affixed a penalty thereto They could not do so for captation, because the springs of human action are hidden in the secret of the heart; because tru e devotion, sincere friendship and the sacrifice of one's future to an aged relative or to a suffering being abandoned by others, too often bear the semblance of low sycophancy, of simulated friendship and of interested self-abnegation; because benefactions should not, like contracts, be measured by the principles of exact justice; and because it is ofttimes useful for individual happiness that private interest should make closer the ties of affection, that sickness, infirmity, old age, incompatibility of temper would otherwise destroy. Nor could human laws visit a punishment upon suggestion, because suggestion is nothing more than persuasion; because one may seek advice from strangers in making liberalities, as well as in business affairs; because the obsessions of a stranger, although pressing and importunate, are nothing more than obsessions, and far from destroying the will of him who yields, tend

to shape it; because an act is not the less voluntary for being originally suggested by some one else. Coin d'Lisle, Don. et Test., pp. 84, 85.

"But when the captator coupled his manœuvres with fraudulent practices; when he resorted to defamation and calumny to estrange the testator from his rightful heirs; when he used unlawful means to keep them aloof; when he confined the testator and denied him intercourse with the outside world, then the law, considering that fraud was the cause, while captation and suggestion were merely the means, intervened and directed the annulment of the tainted disposition. Demolombe, Don. et Test., Vol. 1, p. 413.

"Such was the established jurisprudence in France when Napoleon, first consul, being desirous of codifying the laws of that great nation, confided this task to a government commission composed of Tronchet, Portalis, Mallville and Bigot-Preameneu. In the *projet* prepared by these eminent jurists there was an article in these words: 'La loi n'admet point la preuve que la disposition n'a ete faite que par haine, colère, suggestion, ou captation.' It was thereby intended, as stated by the commentators, to drain the source of those scandalous suits which recurred so frequently before the courts. Not that French judges readily received evidence of captation and suggestion; not that litigation of that character was encouraged or looked upon with favor; on the contrary, although the suits were numerous, so difficult was it to make satisfactory proof that instances of success were very few. But the accursed greed of gold, once it has entered the human heart, rules it with relentless sway, and stops at nothing short of crime to save itself; and disappointed relatives, whose long-cherished hopes of securing a fortune have been rudely dispelled, will not hesitate, when they can not attack a will for any other cause, to trump up a charge of captation, and upon the most frivolous pretext exhume the testator and heap upon his memory the most insulting accusations. His private life, his habits, his secret thoughts, nothing is respected, but everything assumes, at the will of an ardent polemic, the most odious coloring. (Mr. Attorney General Delangle before the Court of Cassation.) This is precisely what the framers of the *projet* of the Code Napoleon wished to prevent. But when the article of exclusion prepared by them came up for discussion in the government halls, it met with

strong opposition. The argument which claimed that, if it was inserted in the code, fraud would find in the law itself a title of impunity and would be encouraged and emboldened, finally prevailed. The measure was voted down. The Code Napoleon remained silent on the subject, and, in the absence of contrary legislation, the jurisprudence which allowed proof of captation and suggestion only when coupled with fraudulent practices, continued undisturbed. Bédarride, Dol et Fraude, Vol. 1, p. 392, No. 389; p. 396, No. 392. Demolombe, Don. et Test., Vol. 1, p. 409; par. 382, p. 410; par. 384, p. 412, par. 385, p. 413; par. 386. Grenier, Traite des Donations, pp. 423-4-5-6. Zachariæ, Vol. 5, pp. 50-51. Laurent, Vol. 2, Editio Parva. Furgole, Vol. 17, p. 133.

"It thus appears that Art. 1492, R. C. C., was not taken from the Code Napoleon. It is a literatim translation of the article contained in the *projet* of Tronchet and his colleagues. It was borrowed therefrom. It was first inserted in the code of 1808, known as the Old Code. At the time that code was adopted, March 31, 1808, the Code Napoleon, then called the Civil Code of France, had been in force for more than four years, and the makers of our code had had the benefit of the debates which preceded the enactment of its prototype in the French council of State and legislative body, so that when our legislators embodied in the Old Code the provision that 'proof is not admitted of captation and suggestion,' they must be held to have done just what Tronchet and the other authors of the *projet* desired, and what the French law-makers declined to do—*i. e.*, close the temple of justice against all suits of nullity for cause of captation, whether unaccompanied or coupled with fraudulent practices. Their intention could not have been merely to declare what was the jurisprudence in France or in Louisiana at the time; on the contrary they must have meant to protest against it, to condemn it and to forever banish from the courts a species of litigation which, except in very rare instances, originates in disappointment, rancor or covetousness; which offers a strong temptation for perjury and subornation of perjury; which feeds on scandal and calumny, and which penetrates within the charnel house to pour obloquy upon the ashes of the departed. Our State reports, be it said to the credit and honor of our people, and in proof of the wisdom of our law-givers, are almost barren of cases of this description. The only two to which I have been referred, 9 La. 469 and 35 An. 163, appear to be in accord with the views here expressed.

I am, therefore, clearly of the opinion that whether undue influence be understood to mean simple captation and suggestion, proof of neither being admitted under the textual provisions of Art. 1492, C. C., defendant's exception of no cause of action in this respect, too, is well founded and must be maintained."

Following the course of the judge's argument we find it fortified both by the history of the article under consideration and by the two decisions to which he refers.

The article appears in the Code of 1808, exactly in its present form. *Vide* Art. 18, p. 212, Digest of the Civil Law.

Then as now the article is found in the chapter that treats " of the capacity necessary for disposing of and receiving by donation *inter vivos* or *mortis causa*."

Evidently no change of purpose has taken place on the part of the Legislature since the establishment of the State government in respect to this article, and as there is no corresponding article in the French Code the conclusion seems to be irresistible that the framers of the Code of 1808 contemplated and intended a change in the body of the law, and this necessitated a departure from the French jurisprudence on the question of captation and sugg stion. Consequently a review and discussion of that jurisprudence, and an examination and comparison of treatises of French authors on the question, would not subserve any useful purpose, but, on the contrary, it might serve to confuse the discussion and divert attention from the simple theory of our own code to the duplex theory of captation and suggestion, that prevails in France—fraudulent captation and suggestion being regarded as a dependency of the statutes of fraud.

This question arose in an early case—Chamdon's Heirs vs. Bongue, 9 La. 468—wherein the will was attacked on various grounds, and *inter alia*, on the ground that the testament was not free and was the result of fraud, and of moral constraint, and the court disposed of the question by making the statement " that it is no longer permitted by our law to attack a testament on the ground that its dispositions were the result of suggestion, hatred, anger and captation, Art. 1470" —thus indicating very clearly that the terms of the code are to be strictly construed. And what is particularly noticeable in the opinion in that case is the close similarity of the facts therein given to the case stated by the plaintiffs.

In Godden's Heirs vs. Executors of Burke, 35 An. 160, the iden-

tical question here presented was there examined and decided—the will being attacked on the ground that it was obtained through undue influence, and the defence being that such charge is not susceptible of proof under the law of Louisiana. The court disposes of the issue thus squarely raised in the following clear and concise terms, viz.:

"It is an error to suppose that this article (1492 R. C. C.), which was first incorporated into the Code of 1808, and which finds no place in the Napoleon Code, was designed to prevent the admission of proof to establish the circumstances which transpire *at* the making of an authentic will, under charges tending to the nullity of the act, for want of compliance with the exigencies of the law. The prohibition embodied in that article against the admissibility of certain proof was intended to apply only to facts arisen *prior* to the making of the will and to close the door effectually against inquiries into the *motives* which animated the testator in disposing of his property." Or, in the further language of the court, the object of the compilers of the code was to preclude all evidence of acts, conduct or motives of the testator *antecedent* to the making of the will, as exercising influence over the testamentary dispositions therein contained; but same were not intended to prevent the admission of proof of what occurred *at the making* of the testament.

For, say the court, "unless it was so, it would ever be impossible to prove that the *dictation* was the result of intimidation, fraud, or some other ill practice; or to establish some other fatal irregularity."

The test which that decision establishes is that the *date* at which the *undue influence* is exercised, and the *object* it is designed to accomplish, and not to the *character* of the *undue influence* used, must control—the purpose of the prohibition being "to close effectually the door against inquiries into the motives which animated the testator in disposing of his property."

In a recent case, the Illinois court had under consideration a precisely similar charge of nullity against a will—Pooler vs. Christman, 34 N. E. Rep. 58—it being alleged by the complainant that the testator, "in executing the (will) was, in fact, under *improper restraint and undue influence* from the said *acts and fraudulent practices*" of the persons named.

In disposing of that question the court said that the first clause of the instruction (to the jury) directing them that fraud and undue influence which should render a will invalid must be connected with

the *execution* of the will, and operating at *the time the will is made*, is sustained by Brownfield vs. Brownfield, 43 Ill. 147," and other cases cited; and that opinion is strictly in accord with that announced in the *Burke* case.

The supplemental petition will be scrutinized in vain for any allegation to the effect that "undue influence" was by the defendant exerted upon the testator *at the time of making the will*, to-wit: the 9th day of July, 1889.

On the contrary, the averment is that defendant "employed unlawful power over his wife's testamentary intentions to defeat her will." Also, that "in her weak condition of health she was subjected to constant surveillance and restraint *up to her last moments* to such an extent as to deprive her of, and destroy her testamentary capacity." Now, in view of the fact that the will was *executed* on the 9th of July, 1889, and the testatrix died on the 11th of October, 1891—two years and three months *subsequent*—any evidence in support of the charge made is impertinent and inadmissible.

Our conclusion is quite clear that this exception of the defendant was well taken, and in sustaining it the judge *a quo* decided correctly.

IV.

The charge of the supplemental petition at which the *third* exception is directed, is that the testamentary disposition in defendant's favor was obtained by means of the ascendancy he had acquired over the testatrix in his character as minister of religious worship whilst he was in attendance upon her during the illness of which she died—plaintiffs' averment being "that the defendant was, at the time of his marriage with the testatrix, and at all times since, professionally attending her as a minister of of religious worship during the sickness of which she died," and that the disposition of the will in his favor "was the result of the *abuse* of the ascendancy which he had obtained over her in the exercise of his calling," etc.; the defendant's objection to evidence in support of it being that same is barred by Arts. 1489 and 1492 of the code.

Both of these articles occur in the same chapter and title of the code which treat of the capacity of disposing and receiving by donations and testaments. Therefore it will be unnecessary for us to repeat anything that has been said in regard to the admissibility of evidence to prove that a testament was made through suggestion or

captation on the part of a beneficiary therein, and we will consequently confine our argument to the effect of Art. 1489, upon the averment and proofs of the plaintiffs.

The following is the text of that article, viz.:

"Article 1489 (1476): Doctors of physic or surgeons, who have professionally attended a person during the sickness of which he dies, can not receive any benefit from donations *inter vivos* or *mortis causa*, made in their favor by the sick person during that sickness. To this, however, there are the following exceptions:

"1. Remunerative dispositions made on a particular account, regard being had to the means of the disposer and to the services rendered.

"2. Universal dispositions in case of consanguinity. The same rules are observed with regard to ministers of religious worship."

Plaintiffs' theory is that the terms of the article *absolutely exclude* a minister of religious worship, professionally attending the testatrix during the sickness of which she dies, from receiving any benefit from testamentary dispositions made in his favor during that sickness, and their contention is that the presumption of the code is a conclusive presumption of law that can not be destroyed by countervailing proof, and that the beneficiary minister, in order to sustain a legacy in his favor, will not be allowed to prove that the reprobated disposition was voluntary.

Per contra, the argument and contention of defendant is that Art. 1489 must be construed with Arts. 119 and 1749 of the Civil Code, and that thus construed an exception is created in favor of the *husband* of the testatrix, notwithstanding he be a minister of the gospel.

That is to say, that although, as a minister of the gospel, a donee under the testament, has professionally attended the testatrix during the sickness of which she afterward dies, he will not be deprived of any benefit from donations made in his favor during that sickness, if he be the husband of the testatrix, the law declaring that the husband *owes* to his wife "fidelity, support and assistance" (R. C. C. 119); and plaintiffs' averment being, "that the defendant was, *at the time of his marriage, and since*, professionally attending (the testat ix) *as a minister of religious worship*, during the sickness of which she died," etc.

Counsel for defendant has very succinctly stated the theory of the defence in his brief as follows, to-wit:

"The conclusion to be derived from consideration of the different articles of the code appears to be an unavoidable one. Mutual fidelity, support and assistance are enjoined by Art. 119 upon the husband and wife. Their relations, each to the other, presuppose as much. Such being the nature of the article, it would be inconsistent with it, to affect with incapacity the particular spouse, who may have bestowed care and given comfort in affliction to the other. In point of fact, to do this would be to condemn and punish the discharge of duty.

"The civil law does not do violence in this way to the natural law. On the contrary, the natural law introduces the civil law and travels along with it. The influence of the husband over the wife, when he happens to be a minister of the gospel, is no more to be apprehended than is any other devoted and pious relation of human existence. The influence in question, if subversive of liberty at all, should be guarded against, not only in case of illness, or when the husband appears in this or the other part in the drama of life, but must be controlled by some rule of daily use and of universal application.

"It is just this which the law has attempted. It would have been unwise, if not impossible, to forbid all donations or acts of liberality between spouses. The code, therefore, has taken the proper precaution in the premises, by declaring that all donations between married persons, made during marriage, should remain revocable. R. C. C. 1749. It is, then, in the proper interpretation of Art. 212 and of Art. 1749, and in the application and enforcement of both of the articles, to the facts and circumstances as they arise, that the security of the married parties is to be sought, and not in the false theory upon which plaintiffs have proceeded, of danger to society from the devoted relations of man and wife."

Our attention has been attracted to other articles of the code as illustrative of the reciprocal rights of the spouses in the matter of their power to dispose of property by gratuitous title generally.

One of them provides that the spouses "can, by marriage contract, make to *each other*, reciprocally, or the one to the other, what *donations* they think proper, under the modifications hereinafter expresed." R. C. C. 1743; the corresponding article of the French Code being 1091.

Another of them provides that "one of the married couple may, either by marriage contract, or during the marriaga, *give to the*

other, in full property, all that he or she might give to a stranger." R. C. C. 1746; the corresponding article of the French Code being 1094.

And the support which the provisions of these articles bring to the defendant's theory is that, notwithstanding the law imposes upon the husband the duty of fidelity, support and assistance, as a *debt* of the spouse, yet it, at the same time, permits the wife, during the marriage, to make a donation to the husband, in full property, of all that she might give to a stranger—thus illustrating the theory of the law to be, that the duties and relations of the spouses *inter se* do not operate as an obstacle to the exercise of testamentary capacity by one in favor of the other, and that this theory, when construed with the provisions of Article 1489, negatives its denunciation in respect to a minister of religious worship when he is at the same time the husband of the testatrix.

These articles are in keeping with the provisions of Article 1749, making donations, whether *inter vivos* or *mortis causa*, always revocable, and conferring upon the wife the power of revoking "without her being authorized to that effect by her husband or a court of justice," this free and unrestricted power of revocation being the fair equivalent of the power of testamentary disposition.

Our attention has also been called to the fact that Art. 212 of the French Code corresponds with Art. 119 of our own code; Art. 909 of the former with 1489 of the latter; Art. 1091 of the former with Art. 1744 of the latter; Art. 1094 of the former with Art. 1746 of the latter, and Art. 1096 of the former with Art. 1749 of the latter—thus rendering an examination of the French jurisprudence permissible, if not necessary.

Referring to the treatise of Marcadé on Donations and Testaments, we find his commentary on the foregoing articles of the French Code to favor the defendant's theory—from which his counsel's argument is chiefly drawn—and, inasmuch as the learned judge of the District Court accepted this author's interpretation of the French law, and, in connection with his own "reasons for judgment," has furnished a translation of the text, we have reproduced it, as follows, to-wit:

"Art. 1489, R. C. C., provides that 'doctors of physic or surgeons who have professionally attended a person during the sickness of which he dies can not receive any benefit from donations *inter vivos* or *mortis causa* made in their favor by the sick person during that

sickness. To this, however, there are the following exceptions: (1) Remunerative dispositions made on a particular account, regard being had to the means of the disposer and to the services rendered. (2) Universal dispositions in case of consanguinity. The same rules are observed with regard to ministers of religious worship.' Does the incapacity created by this article attach to the physician or minister, who is also the husband of the testatrix? The question is new in our jurisprudence, but not so in France. Art. 909 of the Code Napoleon is, in terms, identical with our Art. 1489. In his commentaries thereon, Marcadé, with his usual lucidity of exposition, says: 'All authors concur in the opinion that the prohibition of Art. 909 is not intended for the doctor or minister of worship who may be the husband of the person who has made her will during the sickness of which she died, and it has been so decided by the Court of Cassation on August 30, 1808.

"'And, in fact, as Art. 212 imposes upon each spouse the obligation of personally assisting the other, to strike the husband with incapacity for having given his care and services to his wife would be to punish him for having performed his duty. Besides, between spouses, the captation, the extreme influence of one over the other, is not more to be feared in case of sickness and because of the services which the husband may render as a doctor or as minister than it is in all circumstances of life. It is every day, and in all those moments of outpouring of the heart and of confidential intercourse, that that influence subversive of freedom is to be dreaded. Hence, between spouses, it was not a special rule founded on sickness or on this or that quality of the husband that should have been established. It was by a general rule of daily application that the effects of the too great influence of one spouse over the other had to be prevented, and this is what the law has done. But as it was impossible to prevent all liberalities between husband and wife, the code has deemed it a sufficien safeguard to declare that every gratuitous disposition between spouses shall be revocable at the will of the disposer, as in cases of testaments. And even though the marriage of the doctor or of the minister should have taken place during the malady of which the testatrix died, and in the course of which liberalities were made, it is clear that, inasmuch as the marriage is valid and must produce all its effects, the rules which we have indicated would apply, since they are among the effects of marriage. But this rule is subject to

exception if it be shown by the heirs of the testatrix that the marriage was contracted solely to escape the prohibition of our article; in that case the liberalities would be annulled at the death of the sick person, because the infamous conduct of a man who has entered into the holiest of covenants for the sole purpose of accomplishing his shameful designs could not relieve him of his incapacity under the law. The principle and the exception are justly consecrated by jurisprudence.' Vol. 3, p. 408, No. 530."

The judge also makes quotation from Demolombe to the following effect, viz.:

"By the terms of Art. 212 the husband owes assistance to his wife. Thence flows the duty and the right to give her his services during sickness. It would be revolting to say that the husband should then keep away from his wife and abandon her, in order to preserve his title to the evidences of her tenderness and gratitude. *Ergo*, since the husband who attends or who assists his wife in sickness by so doing fulfils one of the noblest duties of marriage, it is impossible that the legislator should have stricken him with incapacity by reason of the very accomplishment of that duty. And the legislator has not done so. On the contrary, he has by special provisions regulated what liberalities may be made between spouses, whether by marriage contract or during the marriage. Those provisions embody a complete order of principles on that subject, and apply in all cases, and to all husbands without distinction, whatever be their calling, doctor, minister of worship, or other, and in whatever situation they may be. Whence it follows, as has been said by the Court of Cassation, that it was not for husbands that the prohibition contained in Art. 909 was established." Demolombe also holds that the fact of the marriage having been solemnized and of the testament having been made during the last sickness of the testatrix does not alter the rule; provided, however, that the physician or the minister of worship has not married the sick person for the sole purpose of fraudulently eluding the incapacity resulting from his calling. Demolombe, Don. et Test., Vol. 1, p. 556 *et seq.*, No. 543 *et seq.*

To the same general effect are the following authors, viz.: Vazeille on Donations and Testaments, Vol. 2, p. 135; Toullier, ditto, Vol. 3, p. 29, No. 66; Troplong, ditto, Vol. 2, pp. 234, 235; Coin d'Lisle, ditto, Vol. 1, p. 106.

This theory is enforced by Demolombe in the following terms, to-wit:

" 1. Aux termes de l'article 212, le mari doit assistance à sa femme; et de la résult le devoir et le droit aussi sans doute! de lui donner ses soins dans ses maladies; il serait révoltant de dire que le mari devrait alors s'éloigner de sa femme, et la délaisser, précisément afin de conserverses titres aux témoignages de sa tendresse et de sa reconnaisance. Donc, puisque le mari, qui soigne ou qui assiste sa femme, remplit ainsi l'un des plus nobles devoirs du mariage, il est impossible que le législateur l'ait frappé d'incapacité à raison même de l'accomplisement de ce devoir.

" 2. Aussi, n'en est-il rien; le législateur au contraire, a réglé par des dispositions spéciales, ce vui concerne les libéralités entre époux, soit par contrât de mariage, soit pendant le mariage (Art. 1091 et suiv); ces dispositions forment un ordre de principes complêt sur cette matière, et qui s'appliquent dans tous les cas et à tous les maris sans distinction, quel que soit leur état, médecins, ministres du culte ou autres, et dans quelque situation qu'ils puissent se trouver; et il en résulte, comme la Cour de Cassation l'a dit fort justement, que ce n'est pas pour époux qu'a été établie la prohibition contenue dans l'article 909." Demolombe, p. 556, No. 543.

That author expresses the idea to be, that it is not the *minister* of religion who would be deemed incapable of receiving testamentary dispositions, but the *husband*, if the strict interpretation of Article 909, C. N., contended for, prevails; as, in such case, the husband's influence is far greater over the wife than that of the minister can possibly be. Laurent, Vol. 2, p. 484.

In French jurisprudence Rey vs. Broisin is considered the leading case, and upon which the discussions of French authors have chiefly turned. *Vide*, 7 Journal du Palais, p. 121.

Subsequent decisions of the Court of Cassation, while differing therefrom in some respects, have, with general unanimity, affirmed the principles announced therein. Bonnet vs. Dusordet, 15 Journal du Palais, 689; Dusordet vs. Bonnet, 14 Journal du Palais, 592; Boyer vs. Damiens, 17 Journal du Palais, 580.

The only exception stated in those decisions to the applicability of Marcadé's theory is that of a man who marries a woman in fraud of the law, or " with the fraudulent design of defeating the incapacity established by law."

In Rey vs. Broisin, the Court of Cassation say:

" Whereas, the Civil Code, by Art. 1094, empowers the spouses to

give to each other reciprocally within the limits therein set forth all that they may dispose of in favor of a stranger; whereas, Art. 212 imposes upon the spouses the mutual duties of fidelity, support and assistance, whence it follows that it was not for husband and wife that the prohibition of Art. 909 was established; and, whereas, the application of that prohibition was not formally asked before the lower court, as should have been done, the appeal is dismissed," etc.

In that case it appears that a girl who was afflicted with *phthisis*, married her attending physician. A few weeks after the marriage she made a public will by which, after making a few special legacies, she left the bulk of her fortune to her husband as universal legatee. Her brothers brought suit to revoke the will on the grounds, first, that the marriage was a simulation intended to evade the provisions of the law relative to the prohibition against physicians attending persons during their last illness; second, that even if the marriage be valid and legal, the husband being at the same time the physician attending his *fiancé*, the prohibition of the law invalidates her subsequent testamentary disposition in his favor. It was upon these propositions that the judgment of the court was pronounced.

In Bonnet vs. Dusordet, 15 Journal du Palais, 689, the Court of Cassation held that, *if*, under Arts. 1091 and 1094 of the Civil Code, the physician who treated a person during the sickness of which she died, and who married her during the course of her illness, can legally take donations made to him during that interval, it is because these donations are presumed to have been freely made by reason of conjugal affection; but it is otherwise when the donations are *shown not to have sprung* from this affection and free consent, but that they had *no other cause than the influence which the physician had over the patient*, and the *abuse* of this influence by the physician, to obtain these donations from her during her last moments.

It was upon such a state of facts as is contemplated in this last paragraph having been alleged and proven that the donation under consideration in that case was revoked and set aside.

In Dusordet vs. Bonnet, 14 Journal du Palais, 599, the court held that, conceding, in the *first* place, that it clearly appears from all the evidence in the case that the marriage contracted on the 14th of October, and the subsequent universal testamentary bequest of the 18th of the same month, took place during the sickness of which the testatrix died; and, in the *second* place, that the husband had been

originally the only physician of the widow whom he married, and, after he had married her and called in other physicians, that he was the habitual physician and attendant in whom she placed confidence, and that he was thus brought within the prohibitive terms of Art. 909 of the code—hence it was impossible for the legatee to be released therefrom by means of a marriage which was evidently contracted entirely for the purpose of escaping from that prohibition. In that case the donation was annulled and set aside—the wife having died just one month and two days after the marriage.

In Boyer vs. Beaufort, 17 Journal du Palais, 581, the court had under consideration an ante-nuptial marriage contract which the collateral heirs sought to revoke on the ground that the husband of the deceased having attended her as physician previous to her marriage while she was suffering from the illness of which she died, he was incapable of receiving anything from her by such contract. Notwithstanding the court sustained the defendant's plea of ten years' prescription—treating the action as one of rescission—yet they held that if the law prohibited physicians from receiving donations from their patients, it was only in cases where a dangerous influence had brought about these donations, and not where they were freely and voluntarily made, in view of a marriage which actually took place subsequently—the donation, in this last event, possessing a legitimate cause, was secure from attack.

Vazeille defines the articles of the French Code thus:

"Article 909 does not make an express exception for the *husband*, who being a physician gives to his wife the aid and assistance of his art; but Article 212 establishes between spouses the reciprocal obligations of aid and assistance, and Article 1904 authorizes them to make donations to each other. From all which it has been properly concluded that the husband, who is a physician, performs a *duty* in employing his art and in giving his attention and care to the treatment of his wife when sick, and that his profession of physician or surgeon ought not to make him *lose* the right which all other husbands have to the donations from his wife. But it has been held that a marriage which took place during the sickness of the wife for the purpose of getting rid of the prohibition of the law ought not to have the effect of validating the donation otherwise void." 2 Vazeille's Donations and Testaments, p. 135; C. N. 909; *vide* M. Grenier, No. 127; Toullier, No. 66; Duranton, No. 257; Dalloz, Chap. 2, Sec. 7, No. 9.

As Duranton has well said: "Unworthiness should not cover or shield incapacity."

Toullier states that physicians who give to their wives the care and assistance of their art are excepted from the prohibition. Article 1094 gives the spouses the power of giving and receiving, without excepting husbands who are physicians. Under Article 212, spouses owe to each other reciprocally aid and assistance. This is sufficient to establish or prove that the general prohibition of Article 909 does not strike or attach to husbands who are physicians. 3 Toullier's Donat. and Test., p. 29, No. 66.

The foregoing ample citations from the French Code and jurisprudence, as well as from the treatises of French commentators on the Code Napoleon, clearly show their concurrence in text, as in opinion, with our own code and jurisprudence.

After a careful examination of this interesting subject, in all of its bearings, we have reached the same conclusion at which our learned brother of the District Court arrived—that the plaintiffs' complaint of the testamentary disposition being null, on account of the supposed ascendancy the defendant had acquired over his deceased wife, by reason of the influence he exerted over her as a minister of religious worship, is barred by the provisions of Articles 1489 and 1492 of the Revised Civil Code.

V.

Considering the authorities cited and the views that are expressed in paragraph 3, *supra*, to the effect that the framers of the code intentionally closed the portals of justice against "all actions of nullity for cause of captation, whether unaccompanied or coupled with fraudulent practices," it is immaterial for us now to inquire whether the allegations of plaintiffs' petition in this regard are full and complete, or vague and indefinite. And it is likewise equally unimportant for us to inquire whether the intervention is barred by certain antecedent judicial admissions or not.

Altogether the case has been examined and disposed in a manner comporting with the important questions and large values involved, and the high character of the defendant as a minister of religious worship; and we feel justified in saying that none of the charges preferred are tenable in law.

Judgment affirmed.

Rehearing refused.

No. 11,496.

STATE OF LOUISIANA VS. LEONARD LEE ET ALS.

46 623
48 1541

46 623
f52 575
f52 623
46 623
110 726
46 623
112 335
114 415

46 623
116 865

1. Whenever a plea of *autrefois acquit* is demurrable it is triable by the judge and not referable to the jury.
2. The allowance of a severance of trial is matter within the discretion of the judge, except evidence discloses that different defendants have antagonistic defences.
3. An indictment may be fatally defective *quoad* a charge of murder and perfectly good *quoad* a charge of manslaughter.

APPEAL from the Ninth Judicial District Court, Parish of De Soto. *Hall, J.*

M. J. Cunningham, Attorney General, *J. B. Lee*, District Attorney, and *Scarborough & Carver*, of Counsel:

When two persons are killed, whether by the same or different acts, the two killings constitute different crimes which can only be prosecuted separately. Wh. Cr. Pl. and Pr., Sec. 468; Wh. Cr. Ev., Sec. 587; 34 An. 1079.

A judge can be lawfully recused only for one of the causes fixed by law. C. P. 338; Act 40 of 1880, p. 38, and Act 35 of 1882, p 48; Const. 109 and 112.

When a judge is recused, whether of his own volition or on motion of one of the parties or by consent, for a cause not authorized by law, all subsequent proceedings under the lawyer appointed to act as special judge are illegal and absolutely null and void. 27 An. 663, 689; 9 An. 62.

A conviction or acquittal on a trial before a court so constituted does not furnish ground for the plea of *autrefois*.

A conviction or acquittal of the murder of one person does not furnish ground for the plea of *autrefois* when prosecuted for the murder of another person.

Parties jointly indicted not being entitled to a separate trial, as a matter of right, the district judge is vested with the legal discretion to grant or refuse a severance applied for by one of them, and his action will not be reviewed on appeal.

An indictment for a graver offence which includes a lesser may be good for the lesser although bad for the graver; and in such a case, where the accused is convicted of the lesser offence, a motion in arrest should be overruled. 35 An. 1058; Wh. Cr. Pl. and Pr., Sec. 158; Wh. Cr. Ev. 144, 138; 18 N. H. 563.

Goss & Parsons and *J. C. Egan* Attorneys for Defendants and Appellants:

In an indictment for murder malice aforethought must be specially charged. State vs. Green, 42 An. 642; 37 An. 776; Whar. Cr. Pl., Sec. 258; Rev. St., Sec. 1048.

When the objections urged in a motion in arrest of judgment are defects of substance and not errors of form they are not waived by pleading *nor cured by verdict.* 11 An. 648; 14 An. 786; 32 An. 562.

In an indictment nothing can be taken by intendment. State vs. Seay, 3 Stew. (Ala.) 123.

Whatever is indispensably necessary to be proved to warrant a conviction must be alleged in the indictment. State vs. Wilson, 2 Mill. (S. C.) Const. 135; State vs. Philbrick, 31 Mo. 401.

It is a general rule that whatever is essential to the gravamen of the indictment must be set out particularly. Arkle vs. State, 31 Ind. 535.

Every indictment must contain and set forth all the ingredients of an offence. State vs. Henderson, 1 Rich. (S. C.) 179.

An indictment must contain a definite description of the crime charged and a statement of the facts which constitute it or judgment will be arrested. Tenn. vs. Fields Mart. and Y. (Tenn.) 137.

An indictment ought to be certain to every intent and without any intendment to the contrary. United States vs. Forest, 3 Cranch. C. C. 56; State vs. Hand, 6 Ark. 165.

Certainty is an essential ingredient in all pleadings, especially in criminal pleadings, where conviction is followed by penal consequences. State vs. Nutwell, 1 Gill. (Md.) 54.

In an indictment for felony all the facts necessary to constitute the offence must be charged by express averments and can not be left to intendment. Kit vs. State, 11 Humph. (Tenn.) 167.

The essential averments of an indictment at common law are necessary. State vs. Flint, 38 An. 1288.

Where one is tried upon the theory that under the indictment he may be found guilty of murder in the first degree, the fact that the jury found a verdict of guilty of murder in the second degree does not cure an error, if any, that the indictment does not properly describe the offence to constitute murder in the first degree. Redus vs. People, 14 P. (Col.) 323.

An indictment bad for the main offence charged will not support a conviction for a lesser offence which if it were good would necessarily be included. Ter. vs. Dooly, 4 Mont. 295.

As a general rule whatever objection would have been fatal on demurrer will be fatal on a motion in arrest of judgment. State vs. Gates, 9 An. 94.

In an indictment intended to be for murder the substitution of aforesaid for aforethought is a fatal defect, and can not be held a clerical error, as it is a variance of substance, nor as such is it cured by verdict and a motion in arrest of judgment will be sustained. 42 An. 644.

Same counsel on application for a rehearing.

A plea of *autrefois acquit* is sufficient that alleges the identity of the offences, and one act as the cause thereof, and the identity of the evidences to be used in both prosecutions. Such plea is not demurrable on its face, and should be tried by a jury, although the two indictments disclose different persons killed. Clem vs. State, 42 Ind. 420, and authorities cited below.

The rule to determine the identity of the offences and the sufficiency of the plea of *autrefois acquit* is, that the proof to support the second indictment must be such as would have procured a legal conviction upon the first. A. and E. Ency., Vol. 11, 947; Peop. vs. Barrett, 1 John, 66; Com. vs. Cunningham, 13 Mass. 245; Hite vs. State, 9 Yerger, 357; Whar. Cr. Pl., Secs. 456 and 471; 1 Arch. Cr. Pl. and Pr. 112; State vs Vines, 34 An. 1079; State vs. Williams, 45 An. 936.

A motion in arrest of judgment and sentence under the conviction for manslaughter of a defendant tried for murder upon an indictment fatally defective, *quoad* murder, should be sustained, although the indictment was good for manslaughter. Redus vs. Peop., 14 P. (Col.) 323; Ter. vs. Dooly, 4 Mont. 295.

When the objection urged in the motion in arrest of judgment are defects of substance, and not errors of form, they are not waived by pleading nor cured by verdict. 11 An. 648; 14 An. 786; 32 An. 565.

The opinion of the court was delivered by

WATKINS, J. Leonard Lee, having been jointly indicted with C. B.

Adams, Douglas Carpenter and Bill Adams, for the murder of Patria Cordoway, was convicted of manslaughter and the other defendants were discharged. From this verdict and judgment of conviction Lee appeals, relying upon an assignment of errors and three bills of exception, embracing the following objections, to-wit:
(1) That the trial court erred in overruling his plea of *autrefois acquit;* (2) in refusing him a new trial of the aforesaid plea; (3) in disallowing him a severance of trial from the other defendants, and (4) in overruling his motion in arrest of judgment.

I.

The plea of *autrefois acquit* is predicated upon a previous indictment of Leonard Lee alone, on a charge of the murder of *Tom* Cordoway, of which he was duly acquitted on the day previous to his indictment in the instant case for the murder of *Patria* Cordoway. These facts appearing on the face of the two indictments, the controverted question is, whether this plea was one for the judge or jury to decide; and the judge having decided it, defendants counsel assigns his thus deciding as error.

In our opinion the ruling of the court was correct. The question of the sufficiency of the plea was made to depend *solely*, in the court below, upon the recitals of the two indictments—notwithstanding some other testimony was adduced—thus presenting a question of law.

The plea was filed at the August term of the court, 1893, and overruled. There was no bill of exceptions reserved to the judge's ruling. The court was adjourned for the term, and the trial of the cause was deferred until the February term, 1894. At this latter term defendant's counsel filed a motion for a new trial of the plea of *autrefois acquit*, which had been overruled at the previous term—assigning as error therein that the question was for the jury and that the judge had decided it.

The judge refused to entertain the motion on the ground that his first ruling was correct, and defendant reserved a bill.

We take it to be clear that the same rule obtains with regard to the allowance *vel non* of a new trial of a simple motion or plea, as of a new trial of the merits of the cause, and, adhering to that rule, we can not reverse the decision of the trial judge, except in case he has committed a manifest error to the injury of the accused. And the

action of the trial court relative to a new trial can not be examined by this court, unless it is brought before us in such manner as to present *an unmixed question of law*. State vs. Bass, 11 An. 478; State vs. Horton, 16 An. 309; State vs. George, 21 An. 473; State vs. Smith, 22 An. 468; State vs. Bower, 26 An. 383; State vs. Washington, 28 An. 129; State vs. White, 35 An. 96.

Taking up the question as we find it in the record, an unmixed question of law, and applying the precepts of our jurisprudence thereto, it is clear that the defendant's plea of *autrefois acquit* was correctly submitted to the trial judge, and disposed of by him in the first instance, and hence the view that was entertained by the judge on the application for a new trial of the plea was correct also.

In State vs. Shaw, 5 An. 342, it was held, that "when the plea of *autrefois acquit* shows on its face that the offence plead was not the same of which the prisoner was before acquitted, the plea may be demurred to, and it is not necessary to submit it to a jury." Citing State of Tennessee vs. Hite, 9 Yerger, 357.

In State vs. Helveston, 38 An. 314, it seems that the plea of *autrefois acquit* was demurred to by the State, tried by the judge, and sustained, and from the judgment the State appealed. But this court, not doubting the jurisdiction of the trial judge to entertain the plea, reversed his finding on the ground "that the offences charged in the two informations are not the same," etc.

In thus demurring, the State in that case followed the common law practice, for it is stated by Mr. Bishop to be the rule that "if the plea is inadequate in form, or if the two indictments are such *that the offences can not be the same*, the prosecuting officer demurs." 1 Bishop's Crim. Proc., Sec. 817.

And the purport of our decision in the recent case of State vs. Emma Williams, 45 An. 936, is that this is a correct rule and is to be followed.

Mr. Wharton announces a like doctrine. Whar. Crim. Pleading, Secs. 482 and 484.

Looking into the defendant's plea of *autrefois acquit* filed in the instant case, we find it to be alleged that he had theretofore been indicted, tried and acquitted of the murder of *Tom* Cordoway—referring to the cause by title and number, and averring that the crime therein charged against him *is identically the same* as that for which he is prosecuted in the indictment in the instant case. But looking

into the indictment in the instant case we find the charge against the defendant to be the murder of *Patria* Cordoway. The two indictments are component parts of the plea, and considering them in connection it is evident that the plea was demurrable, as the crimes charged were not the same.

As this court had occasion to say in quite a similar case:

"The *corpus delicti* in each (case) is in every respect distinct and independent." State vs. Vines, 34 An. 1079.

II.

This point of objection being necessarily involved, in principle as well as in fact, with the first one, the two were taken together and disposed of at one and the same time.

III.

The defendant, Lee, filed a motion, praying for a severance of trial from his co-defendants, on the ground, mainly, that his defence was contradictory of that of the other defendants—one of the defendants having, on a former trial, made statements implicating him as a *particeps criminis* to the homicide; and the trial judge having declined to award the severance, he reserved a bill of exceptions.

It is stated by the judge as a reason why he had refused the application "that no sufficient ground for the severance was shown. The district attorney states in his evidence on the trial of the motion that he would offer no confession of either of the four defendants indicted as principals, in which either of the others was involved; and this was strictly adhered to throughout the trial," etc.

The general rule is, that persons jointly indicted are not entitled to a severance of trial as matter of right, though the trial judge may, in the exercise of his discretion, grant a severance. State vs. Leonard, 6 An. 420; State vs. Cozan, 8 An. 109; 1 Bishop Cr. Pr., Sec. 1018; Whar. Cr. Pl., Sec. 309.

It is proper for the judge to grant a severance in case the confession of one jointly indicted may implicate both—in case the prosecution intends to offer same on the trial. 1 Bishop Cr. Pr., Sec. 1019; Whar. Cr. Pl., Sec. 310.

It appears that the district attorney directed the evidence on the part of the State to this exception—disclosing his intention to

be, not to make use of any such confession on the trial, as the defendant apprehended; and it was on that testimony the trial judge rested his declination to grant a severance.

And it is quite apparent that he in no wise abused his discretion in refusing it.

IV.

The question that is raised for decision on the motion in arrest of judgment is—the indictment charging the defendant, Lee, jointly with several other persons with the murder of Patria Cordoway, and the averment thereof being that the several parties "did wilfully, feloniously, and of *his* malice aforethought, kill and murder Patria Cordoway—" whether the indictment is fatally defective in a matter of substance, because the *singular* pronoun "his" was employed, representing only one of the several persons accused.

The trial judge assigns the following reasons why he declined to entertain defendant's motion, viz.:

"While the indictment is not good for murder, it is good for manslaughter, for which (crime) the defendant is convicted, and he is without interest to inquire as to its sufficiency for murder, since he is acquitted of that (crime)."

It is evident that the judge's ruling was correct. Had all the parties been convicted, or, possibly, if any one of them had been, the indictment would have been held bad, on the authority of State vs. Jones, 45 A. 1454, the doctrine of which case we unhesitatingly affirm.

The case appears to have been correctly disposed of in the court below. Judgment affirmed.

Rehearing refused.

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46 629
47 661
47 767

No. 11,436.

UNION NATIONAL BANK VS. J. E. CHOPPIN ET ALS.

46 629
107 743
46 629
113 275
113 276

In a suit brought by the Union National Bank as one of the joint owners of a plantation against three brothers, each holding an undivided one-fourth interest in the property—one of the defendants died leaving as his presumptive heirs, his mother, a sister, the two brothers already in court and a fourth brother. The mother died without either accepting or renouncing as his heir. On motion of plaintiff the three brothers and the sister were made parties and cited as heirs of their mother and also of their brother. After "judgment by default" against all the defendants, but prior to the confirmation thereof, the parties so cited appeared and announced that they had renounced and did

then renounce the succession of their mother and suggested that no further proceedings could take place until the succession of the mother was represented by an administrator. The court, thinking otherwise, rendered a decree for the sale of the property and a partition. The defendants appealed. *Held:*

1. That the "judgment by default" did not conclude the parties and cut off a renunciation by them of their mother's succession—such a judgment not being definitive in its character.
2. The tacit admission resulting from the judgment by default disappeared at once upon the filing of the disclaimer without the necessity of a formal setting aside of the default by motion.
3. It was not necessary, in order to prevent judgment being rendered against these parties as heirs of their mother, that they should have renounced her succession by notarial act; the paper filed by them sufficed for that purpose. Defendants owed no duty to plaintiff—were not its debtors and could not be forced against their will to accept the succession.
4. The parties cited having, however, not disclaimed being heirs of their BROTHER, but allowed a definitive judgment to be given against them as such, must be held to have accepted HIS succession and they as such heirs represent directly an interest in the interest formerly held by him.
5. The immediate heirs of the mother having renounced her succession and there being no others known, plaintiff and the court are warranted in acting upon the assumption that the interest which had been cast upon the mother had devolved upon the sister and the three brothers by reason of accretion and the indivisibility of their acceptance of their brother's succession.
6. A sale by licitation made contradictorily with the parties now before the court will convey a legal title to the purchaser.

APPEAL from the Twentieth Judicial District Court, Parish of St. James. *Guion, J.*

Sims & Pochè and *Carleton Hunt* Attorneys for Plaintiff and Appellee.

Pugh & Lambremont Attorneys for Defendants and Appellants.

The opinion of the court was delivered by

NICHOLLS, C. J. The plaintiff corporation in 1889, as owner of an undivided portion of the Home plantation, in the parish of St. James, brought this suit against the three original defendants, Dr. Pierre F. Choppin, Louis H. Choppin and Joseph E. Choppin, then the owners of the other undivided portions of said plantation, for the purpose of obtaining a judicial partition of the property. The three defendants were cited, and in due course P. F. and L. H. Choppin filed their answer. J. E. Choppin not answering, a judgment by default was entered against him.

Subsequently to this Joseph E. Choppin died, leaving as his legal representatives, his mother, Eugenie Forstal, widow of Valerien Choppin; his sister, Mrs. Adele Choppin, wife of Robert G. Dugué; his brother, Fernand Choppin, and his two brothers, Pierre F. and Louis H. Choppin, the two latter being, as we have seen, original defendants in the case. On the suggestion of the death of J. E. Choppin, plaintiff obtained an order of court making his legal representatives parties. A copy of this order was served on those representatives, but no citation was served. Subsequently one of those representatives (Mrs. Valerien Choppin, the mother) died, without having appeared or filed answer. Whereupon plaintiff obtained another order, making *her* heirs parties. A copy of this order was served on said heirs on the 29th and 30th May, 1891, also without citation. On the 2d of June, 1891, only two days after service of the above order, the cause was, on plaintiff's motion, set down for trial on June 10. On that day (over the objection of counsel of P. F. and L. H. Choppin, who thereupon withdrew and refused to take part) the case was taken up, tried and decided. The two original defendants surviving, appealed. On appeal the judgment rendered was avoided and reversed, and the case remanded for further proceedings (see Union National Bank vs. J. A. Choppin *et al.*, 44 An. 171), the court holding that where the defendant in a cause has "not answered" further proceedings against his heirs must be conducted in conformity to Art. 120 of the Code of Practice, and the citation or notice and the delays therein prescribed must be allowed.

After the case had returned to the District Court the plaintiff filed a petition setting forth the death of J. E. Choppin and Mrs. Valerien Choppin, and the names of the legal representatives of both of them (the legal representatives being the same persons in each case), viz: P. F. Choppin and L. H. Choppin (the two original defendants), Fernand Choppin and Mrs. Robert G. Dugué, and praying that as such they be duly cited to appear, etc., and that the decree of partition be rendered contradictorily with all parties in interest. Service having been made on these new parties and no answer having been filed by them, a judgment by default was entered against all of the defendants on the 7th of February, 1893.

On the 14th of February the defendants appeared and filed the following document:

"Into court now comes Robert Fernand Choppin, Pierre F. Choppin, Henry L. Choppin and Mrs. Robert G. Dugué and her husband, to authorize and assist his said wife, solely and exclusively for the purpose of suggesting and informing this Honorable Court that they have renounced and do hereby renounce the succession of Widow Valerien Choppin, their mother; that the succession of said Widow Choppin has been opened and prayer for administration thereof made in this Honorable Court; that until said administrator is appointed this suit should not be proceeded with, as there is no person capable of standing in judgment for said succession."

On the day the case was fixed for trial plaintiff moved to take it up pursuant to assignment, but defendants objected to doing so "by reason of the filing of their suggestion, February 14, 1893;" and thereupon the court ruled that it would hear evidence upon the suggestion, as it considered that the proper mode for proceeding with the case would be first to hear evidence upon the character of the renunciation relied upon as in the nature of an exception peremptory in its character. The only evidence offered by the defendants named in the suggestion was an application filed by Henry L. Choppin to be appointed administrator of the succession of Widow Valerien Choppin, and a petition for an inventory also filed by the same person on the 13th day of February, 1893.

In the last petition it is stated that petitioner had heretofore applied to be appointed administrator and for an inventory, but that although the latter had been ordered, it had not yet been taken by Robert G. Dugué, notary. Upon this application the district judge ordered an inventory to be made by the district clerk, *ex-officio* recorder.

After hearing the evidence the court ruled that the suggestion filed on February 14, 1893, should not be entertained, as it did not amount to a renunciation of the succession of Mrs. V. Choppin; that even had a renunciation in due form been shown the trial of the case should not be arrested, there being no *personal judgment* sought against the suggestors, the action being simply to partition an estate.

The court ordered the case to be proceeded with, whereupon counsel for defendants announced that he would take no part in the proceedings for the reason stated and reserved a bill of exceptions.

The case was submitted to a jury, a verdict rendered in favor of plaintiffs as prayed for and a definitive judgment of partition ordered.

From this judgment the defendants prosecute the present appeal, and plaintiff for answer to the appeal prays for damages in the sum of five hundred dollars on the ground that it is frivolous.

The *syllabus* of defendant's brief, with the authorities there referred to, concisely shows the position taken by them. Their contention is:

1. That in an action of partition all parties in interest must be joined or represented, and on issue by one of the defendants plaintiff must show that the proper parties are before the court. C. C. 1329; Man. 42; Hennen's Digest, 1076, No. 7; 30 An. 182; 31 An. 394; 2 An. 446; 16 La. 157.

2. The heir is only considered as heir as long as he does not manifest the will to divest himself of that right by renouncing the succession. C. C. 1014; 31 An. 261.

3. Heirs, by renouncing, become strangers to the succession, the same as if they had never been heirs, and can not stand in judgment touching or concerning any right of the deceased. This renunciation *retroacts* to the opening of the succession, and, in point of law, the heirs have never been heirs. 31 An. 261; 33 An. 100.

4. Art. 1017, C. C., is not exclusive of every other mode of renunciation. A succession may be legally and validly renounced by a judicial declaration to that effect, if, in his pleadings in obedience to any action of any party in court, the court is called upon to say whether he accepts or renounces. If the heir renounces in open court, by his pleadings, he is not required to comply with Art. 1017. 33 An. 101; 44 An. 553.

5. The heirs of Mrs. Choppin, in a fit and appropriate proceeding, informed the court that they had renounced the succession of their ancestor, "and do hereby renounce the same." This judicial admission is binding on them, and constitutes full proof against them, and the court should have upheld the renunciation. 33 An. 101; C. C. 1036, 1037, 1038, 2290, 2291; 31 An. 261; Hennen's Digest, 519; No. 2—520, No. 22; 43 An. 729, 822; 34 An. 815; 23 An. 209; 18 An. 409. Having renounced, the defendants were strangers to Mrs. Choppin's *succession*, and no further proceedings should have been taken until the succession was represented. 38 An. 243; 2 An. 466; 42 An. 880; 21 An. 486; 31 An. 574; 35 An. 289; 13 An. 487; 18 An. 282; 34 An. 323, 591.

6. On the trial of their plea, defendants showed that the succes-

sion of Mrs. Choppin had been opened in St. James. It was not necessary to offer in evidence the pleadings. 9 Rob. 22; 27 An. 537.

7. The renunciation contained in the pleadings constituted full proof against the defendants. C. C. 2291; Hennen's Digest, 519, No. 2.

8. Mrs. Choppin's interest in the property sought to be partitioned being unrepresented, no valid judgment of partition could be rendered for want of proper parties. 31 An. 394.

9. Plaintiff complains of delay, but, as said in 44 An. 170, the precipitate proceedings of plaintiff were in disregard of the legal rights of appellants. Plaintiff can blame no one for its own illegal acts.

Plaintiff's contentions are set forth in the syllabus of their brief with equal conciseness, as follows:

"1. The defendants and appellants are estopped from denying the fact of their being the legal representatives of Mrs. Choppin, or their capacity as such to stand in judgment in this case. They assumed that quality in their appeal before this court, No. 10,972 of the docket. They can not now shift their position to a contradictory one to defeat the action of the law upon it. 44 An. 171; Hennen's Digest, Vol. 1, pp. 519 and 520; 6 M. 280; 4 An. 416; 11 An. 710; 5 An. 8, 18; 6 An. 719; 11 An. 501; 12 An. 558; Succession of Plunkett, 12 An. 445; Reed vs. Crocker, 14 An. 308.

"2. The document filed February 14, 1893, is not a plea—it contains no prayer, and is neither an exception nor an answer. It merely suggests non-action by the court upon a statement unsupported by proof. Disclaimer of heirship is a matter of privilege and must be presented and urged by plea. 7 An. 239.

"3. If said document be considered in the light of an exception it is of the dilatory kind and must be pleaded *in limine*, and could not be pleaded after issue joined. The object of the plea was to secure personal immunity by disclaimer of rights of heirship, so as to affect the legal status of the pending partition suit then at issue with all parties in interest. This the defendants could not do after default, which is equivalent to issue joined by answer. Hennen, 1163; C. P. 333; 12 La. 618; 6 R. 484; 11 Rob. 7; 10 An. 140; 1 An. 117; 11 An. 686; 14 An. 658; 8 An. 73; 7 An. 239; 19 La. 429; 1 La. 113-283.

"4. No proof adduced of fact of renunciation. Application of one of defendants for letters of administration and for inventory in suc-

cession of Mrs. Choppin implies acceptance under benefit of inventory. Duty of beneficiary heir to provoke inventory. C. C. 1035; 12 An. 610; 2 An. 268.

"5. The default entered February 7, 1893, against all of the defendants was not set aside; by failure to answer, defendants presumed to confess justice of plaintiff's demand for partition. C. P. 360. Delays having expired after default, the judge correctly 'decreed the partition.' C. P. 1027.

"6. In partition suit the heirs must be parties; they alone are capable of standing in judgment. Executor or administrator can not. C. C. 1329; C. P. 123-1024; 2 An. 341; 7 An. 477; 30 An. 177; Boutte vs. Boutte, 26 An. 606; Veazy vs. Trahan, 4 An. 571; 17 La. 348; 19 La. 36; 4 An. 56-571; 16 La. 157; 4 An. 260; 15 An. 250. All rules governing partitions of successions applicable to partitions between ordinary co-proprietors. C. C. 1289-1290. No inventory necessary. 36 An. 318; 44 An. 550.

"Heir considered seized of succession from date of parent's decease, and becomes undivided proprietor of its effects. Right of possession of deceased continues in heir and latter holds in common with co-heirs until division is made. C. C. 1292; 5 An. 561; 21 An. 253.

"7. Appeal is frivolous and appellee is entitled to damages. Hennen, Vol. 1, pp. 101-102; 3 N. S. 248; C. P. 907; 31 An. 427."

The parties who filed the paper referred to had been, upon the motion of the plaintiff itself, cited and made parties as heirs of Mrs. Choppin; they were therefore not strangers to the controversy, but had an interest in not permitting a final judgment to be rendered contradictorily with them as heirs of their mother. They had the legal right to appear in court and disclaim an interest in that capacity in the suit just as a lessee or any other person would have the right to disclaim. Whether their disclaimer at the time and as made would be available to them is a different question. If in point of fact and law they were not at that time the legal heirs of their mother, and if it would be legally necessary to thereafter make such heirs parties, the suggestion made in the paper would bring the court and the plaintiff itself to confront not a mere question of form or of pleading, but a fact, and one of such a character as possibly to radically affect the legality of any sale which might subsequently be made in the partition proceedings. Not only were the two surviving original

defendants standing upon their original rights as joint owners interested in the legality of the proceedings, but the plaintiff itself was concerned in the result. The court properly considered the paper as having been legally filed, and acted upon it.

Article 1329 of the Civil Code declares that where a partition suit is brought by one heir, who wishes to partition, the co-heirs or their representatives must be cited, and the decisions have been, as far as we know, unvarying that in all partition proceedings all parties in interest must be before the court. When we say the proper parties must be before the court we mean that the action must have proper parties not only at its beginning (Dugas vs. Truxillo, 15 An. 117), but throughout to its close. If during the progress of a suit an interest which the law required necessarily to be represented, and which at one time was represented, should cease to be so, either by death or other legal cause, steps would ordinarily have to be taken to replace its representative and to cause it to be again represented, no matter how much delay might result from carrying out this legal requirement. Plaintiff concedes that that portion of the joint interest held by J. E. Choppin which devolved upon his mother as one of his heirs at his death must be legally represented in the proceedings, and it has attempted to have this done. We are therefore to inquire whether that interest is still represented or CAN BE HELD AS legally represented in the present proceeding. If it is NOT, and it should be, we will be powerless, no matter how apparent defendant's motive in renouncing their mother's succession might be, to postpone a partition to which they object.

In the examination of that question the first proposition which meets us is whether at the time the presumptive heirs of Mrs. Choppin (in what we will style the renunciation of their mother's succession) declared that they did so renounce they were precluded from doing so by the time and circumstances under which this was done. In support of the contention that they were precluded, the first reason assigned is that after having been cited as heirs of their mother they had permitted a judgment by default to be entered against themselves as such, and that that judgment has never, by motion, been set aside; that that fact fixed their *status* as such heirs. Defendants meet this by the declaration that they knew of no law which prevents an heir from renouncing up to the time that he permits *judgment* to be rendered against him; that "judgment"

is a technical expression, and does not mean judgment by default as defined in the Code of Practice; that Article 1000, C. C., says *when* the penalty of liability shall be inflicted on the heir, and that the penalty only springs into existence when the heir, in the very words of the law, "suffers judgment to be given against him;" "that penalties can not be extended, and when the law specifically fixes and determines *when* the penalty shall be inflicted is a prohibition against it under all other conditions; that judgments by default create a tacit issue, but do not cut off peremptory bars or exceptions; that pushing the doctrine advanced to its legitimate conclusion we would have to interpolate and read into Article 1000 the words 'judgment by default;' whereas, the article, as it now stands, requires a 'judgment' to be rendered before the heir is liable; that up to the rendition of the 'judgment' defendants' right to renounce was given them by law, and they exercised this right at the time and under the conditions laid down by the LAW."

The general rule governing the acceptance of successions is contained in Article 977 of the Civil Code, wherein it is declared that "no one can be compelled to accept a succession in whatever manner it may have fallen to him, whether by testament or the operation of law. He may therefore accept or renounce it."

This general rule is modified under the special circumstances referred to in Articles 1021 and 1071 of the Civil Code, but the contingency for which these articles provide does not arise in this case. Article 1031 of the Civil Code announces the general rule as to renunciations to be that "so long as the prescription of renunciation is not determined the heir may still renounce, provided he has done no act to make himself liable as heir."

As bearing upon the question as to the circumstances under which a presumptive heir would by his own act render himself liable as an heir, we quote as follows from our Civil Code:

"The person called to the succession does an act which makes him liable as an heir if, when cited before a court of justice as an heir for a debt of the deceased, he suffers judgment to be given against him in that capacity without claiming the benefit of inventory or renouncing the succession." Art. 1000.

"If the heirs thus cited (to declare whether they accept or renounce the succession) declare that they accept the succession, or if they are silent or make default, they shall be considered as having

accepted the succession as unconditional heirs and may be sued as such." Art. 1037.

"In case the heir makes default on this demand, he shall be considered as unconditional heir and be bound as such." Art. 1057.

In Art. 1010, C. C., we find explained the character of the "default" here referred to. It is there declared that "he (the presumptive heir) must not have been decreed by a definitive judgment to be the unconditional heir, nor have accepted at the suit of the creditors instituted to oblige him to assume this quality."

A "judgment by default" not being a DEFINITIVE judgment, we must hold that the fact of renouncing is not lost by simply permiting such a judgment to be entered, provided the renunciation be filed prior to the CONFIRMATION.

It was not essentially necessary that the judgment by default should have been "set aside" by motion to that effect prior to the filing of the renunciation. See Hassam vs. McVittré, Manning's unreported cases, p. 192.

The judgment by default evidences, it is true, a tacit admission, but it necessarily disappears when, prior to such an admission being acted upon, a paper is filed which directly negatives the fact supposed and deemed to have been admitted. The plaintiff next claims that the defendants were estopped from renouncing for the reason that on the former appeal their heirship was admitted by them and the only question raised by them was as to the sufficiency of the notice served on them as heirs of J. E. Choppin and Mrs. Choppin.

The defendants filed no pleadings in the former suit—they simply abstained from taking part in the trial of the case, and after the judgment of partition had been rendered they appealed. They did not assume anywhere in the proceedings the quality of heirs of either their brother or their mother. Their complaint *was not that they as such heirs* had not been properly made parties, but that *the heirs* of J. E. Choppin and Mrs. Choppin had not been cited. There were several persons *other than themselves* who were the presumptive heirs and to whom this objection might apply. Plaintiff overlooks the fact that the two surviving original defendants, as two of the three joint owners, had *substantive rights of their own* in the matter of regularity and legality of the partition, which authorized them to raise and urge the objection they did *independently of any question of heirship*. We do not think they were estopped on the ground urged.

Plaintiff next claims that the defendants have not renounced the succession of their mother. That Art. 1017 of the code requires that the renunciation of a succession should be by authentic act, and that an attorney at law has no authority, by pleadings on behalf of his client, to bring about such a result.

We will not discuss, in all the various phases which it might take, the question whether an authentic act be necessary to operate the renunciation of a succession. We limit our inquiry to the facts of the particular case before us, which is that of a THIRD PERSON attempting to proceed as plaintiff in a partition suit against defendants upon the hypothesis that they are the heirs of a person deceased. It is not claimed that the defendants are the debtors of the plaintiff, or owe him any legal duty. They are not legally called upon to accept the succession of their mother, and can not be required to take that position. The plaintiff by simply suing them could not FORCE them so to do. The success of plaintiff's attempt was CONTINGENT upon either their SILENCE or upon proof by the plaintiff (should the defendants deny their *status* as heirs) that they had done some act which had bound them to that *status*. But the defendants *were not only not silent*, they expressly disclaimed, and there is no proof on the record of their having committed themselves by any act to being heirs of their mother. By their pleadings they have certainly estopped themselves from ever setting up adversely to the plaintiff any right predicated upon their being their mother's heirs. Had the defendants renounced by *notarial act* they could still accept the succession, provided it had not, in the meantime, been accepted by other heirs, but they could not do so to the prejudice of acts done on the faith of their renunciation. Their course here as effectually concludes them as if evidenced by a notarial act.

We are next to consider what the effect (if any) is of the renunciation by the defendants of Mrs. Choppin's succession.

If we consider Mrs. Choppin's succession as not being DIRECTLY a party to the proceedings as they stand, who are the actual parties defendant and in what capacity?

The two surviving original defendants are in actual possession of the property sought to be partitioned; they are in court individually as holders of their original rights as joint owners, and they have not disclaimed being the heirs of their brother, J. E. Choppin, who held also a joint interest. Fernand Choppin and Mrs. Dugué are also be-

fore the court as heirs of their brother; therefore J. E. Choppin's interest is (to a certain extent at least) *actually and directly* represented by the three brothers and the sister. A portion of *J. E. Choppin's* interest—that portion which devolved at his death upon his mother—*is either still outstanding vested in her vacant succession, or in some heir who is up to date unknown* and has not *presented himself*, or it has been cast upon the two original defendants, the brothers of the deceased, Fernand Choppin and Mrs. Dugué, who have accepted HIS succession by reason of accretion and indivisibility of such acceptance. C. C., Arts. 986, 1022, 1024.

The portion of *J. E. Choppin's* interest which devolved upon Mrs. Choppin was never accepted by her. During her lifetime she took no action in the matter as far as we are advised, and when she died this interest was transmitted as a right belonging to her succession—subject to acceptance or rejection, unless controlled by exceptional facts. Such we understand to be the present position of affairs in this matter. The present action it must be remembered is not one *inter se* of co-heirs holding under a common or single title, but the action of a third person holding a joint interest in real estate by distinct title suing the heirs or supposed heirs of a person who held another joint interest in the property, which heirs as between themselves hold under a common or single title that joint interest. Under the *peculiar circumstances of this case* is it essentially necessary that matters should be stayed either until a *curator* should be appointed to the succession of Mrs. Choppin as a vacant one, or until the persons who upon the renunciation of the defendants would (if such were possible) become her heirs should be made parties, or are the brothers and sister who have accepted as heirs of their deceased brother, J. E. Choppin, held for the purposes of this suit to represent his entire succession and his entire interest in the property sufficiently to make the title which would be conveyed under a licitation sale in these proceedings a safe and valid one.

In the consideration of the subject we have not overlooked the provisions of Article 1320 of the Civil Code, which is to the effect that "it is not necessary to support the action of partition that the co-heirs or the parties commencing it should be in actual possession of the succession or of the thing to be divided, for among co-heirs and co-proprietors it is *not the possession*, but the *ownership*, which is the basis of the action."

There are two articles of the code which strike us as being entitled to some weight in reaching our conclusions. They are Articles 1381 and 1031.

They are as follows:

"If, after the partition, an heir appears whose death has been presumed, on account of his long absence, or whose right was not known, as if a second testament, unknown until then, should entitle him to inherit with the others, the first partition must be annulled and another must be made, of *all the property remaining in kind, and of the value of whatever has been consumed or alienated*, in order that he may have the share to which he is entitled" (Art. 1381).

"So long as the prescription of the right of accepting is not acquired against the heirs who have renounced, they have the faculty still to accept the succession, if it has not been accepted by other heirs—*without prejudice, however*, to rights which may have been acquired by third persons upon the property of the succession, either by prescription *or by lawful acts done with the administrator or curator of the vacant estate*" (Art. 1031).

It will be seen by Art. 1381 that there are some circumstances under which a sale made in partition proceedings, in which a person who actually had rights of ownership in the thing partitioned was not represented, would still hold good, and the rights of this unrepresented person would be restricted to a partition of the *property remaining in kind* and of the VALUE of whatever may have been consumed or alienated. The doctrine here announced is but the application of the doctrine of Art. 1031, under which subsequently known and asserted rights are made to be asserted in subordination to rights lawfully acquired under dealings prior to their own being presented and advanced.

The facts of the present case do not bring it directly under either of the articles cited, but they have none the less attracted our attention as we have stated. If there be any possible heirs to the succession of Mrs. Choppin they are not *known* so far as the record would go to show, and whilst we could not absolutely and positively say that there is no one who could or would accept that succession, what we do see of the succession impresses us with the moral conviction that there is no such heir, and no one who will ever do so. No rights of creditors of Mrs. Choppin's succession appear to be involved.

We are of the opinion that a sale made in the proceedings as they stand, with the parties as they are, would convey to a purchaser such a title as would protect him against eviction based upon any rights which might hereafter be advanced upon a claim in or upon the property subjected to be partitioned under and through Mrs. Choppin's succession.

We find a case (that of Buret vs. Lefebvre) decided by the French Court of Cassation in 1865 (Journal du Palais, 1865, p. 645), which, though its issues were much wider and broader than those in the present proceedings, bears some resemblance to it.

The facts of the case were these:

The Widow Collet died in 1842. The only persons who at that time presented themselves to receive her succession were Courgibet and Trésuffle, heirs in the paternal line; these made a donation of a portion of their rights to a Mrs. Croissant and a Miss Mouliés. On the 15th of June following there was a partition of the succession under which the real estate was allotted to Miss Mouliés. In 1852 Routiere and others, alleging themselves to be the sole heirs of the Widow Collet in the maternal line, brought a suit against the paternal heirs (NOT INCLUDING COURGIBET) asking a new partition of the succession or the restitution of one-half of the value of what had been allotted to them. In this suit they recovered from defendants by judgment under date of 16th of August, 1852, the sum of forty-four thousand francs.

In 1859 twenty-eight new heirs in the maternal line, majors and minors (the latter represented by their tutors) "revealed" themselves and brought a subaction of partition solely against the heirs of the maternal line who had figured in the suit of 1859 without even making the heirs of the paternal line parties. On the 19th of December, 1859, judgment was rendered in their favor.

In 1862 several of the maternal heirs who had obtained this last judgment brought a suit against the heirs of Widow Collet in the paternal line, having in view the definitive partition of all the movable and immovable property of the succession. The heirs so cited contended that the partition of 1842, having been made in good faith and executed since by the maternal line, was beyond attack.

In December, 1862, the lower court rendered a judgment condemning Courgibet to account to the maternal line for one-half of the amount he had received in the succession of Mrs. Collet, and then

(distinguishing between the majors and *minors*) rejected the prayer of the majors for a new partition, and reserved to the *minors*, or their tutors, the right to bring an action, when they should have been legally authorized to do so by a family meeting.

The Court of Cassation held, when the case was brought before it, that the plaintiffs (already bound by the judgment of 1852, executed as to themselves by reason of the subaction of partition granted upon their prayer in 1859) could not ask a new general partition; that they could not take advantage of the fact that Courgibet had not figured in the judgment of 1852; that all that the plaintiffs were entitled to would be to exact from Courgibet (who had not as yet paid anything back of the amount he had received) one-half of what he had received from the partition of 1842; that *especially were plaintiffs not permitted to have a licitation sale of the real estate which had been allotted in the first partition to Miss Monlies.*

The court held that the lower court was wrong *in discriminating between the majors and the minors*, stating that the *course pursued by the tutors* of the minors in asking a subpartition from those heirs in the maternal line (Routiere and others) who had recovered the forty-four thousand francs from the heirs in the paternal line *was the precise course which legally under the circumstances they should have taken.* In announcing its decision the court used the following language:

" Ces partages (those of 1842 and 1852) ainsi consommés de bonne foi devaient être considérés comme irrévocables contre toutes les parties qui étaient toutes majeures, au moins à l'égard des héritiers maternels, quoique saisis de plein droit de la succession ils n'étaient pas obliger de se porter héritiers, et jusqu'à ce qu'ils se fussent fait connaître en prenant qualité, la ligne maternelle avait été représentée vis-à-vis de l'autre ligne par ceux qui avaient fait valoir leur droit; les héritiers inconnus de l'autre ligne ne pouvaient plus désormais agir que contre leurs co-héritiers de la même ligne afin d'être admis au partage des valeurs recueillies a leur prèjudice par ces derniers; c'est ce qu'ils ont fait lorsqu'en 1859 au nombre de 28 majeurs et mineurs—ces derniers représentés par leurs tuteurs—ils ont demandé un sous-partage contre les seuls héritiers de la ligne maternelle qui avaient figuré dans l'instance de 1852 sans même mettre en cause les héritiers paternels."

It will be seen that the French court placed two partitions, which

had been carried on in the absence of unknown parties having actually existing rights (which, however, had not been advanced or asserted), in the same situation that our code, under Art. 1381, places partitions which have been carried on under the erroneous idea that one of the co-heirs who was still living had died, or had been carried on in ignorance of the existence of a will which created rights in the property sought to be partitioned, and had given to the party in whose favor they were created a legal interest in the partition. It will be seen that in the second suit *two* out of *a great number* of *heirs* in *the maternal* line were *permitted quoad the heirs in the paternal* line to represent *the entire interest of the maternal line*—that the transfer of the real estate which had been made in the first partition to Miss Mouliés was maintained, and that the unknown or non-appearing heirs (even the minors) in the maternal line were restricted in their remedy to a suit against the co-heirs of their own line for their pro rata of what had been received by them, and to a contribution in money from one of the co-heirs in the paternal line, who had never paid back to any one the overplus he had received in the first partition.

In the case at bar finding that four of the presumptive heirs of J. E. Choppin have been duly cited and are in court; that they have permitted judgment to be rendered against themselves as such in the lower court, disclaiming neither there nor here their heirship; finding that certain known heirs of Mrs. Choppin have renounced, and that if there be any other heirs, they are unknown—at all events that they have certainly *not presented themselves*, and finding no rights of creditors involved, we are of the opinion that under the exceptional circumstances of this case the plaintiffs, as joint owners of the property, are justified and warranted in proceeding contradictorily against these four heirs of J. E. Choppin as representing his entire interest in the property, and in assuming that the apparent interest therein of Mrs. Choppin has been cast upon four heirs (now in court) by reason of accretion and of the indivisibility of their acceptance of the succession of their brother. In the examination of this case, that of Savage vs. Williams, 15 An. 252, has not escaped our notice. Should any claims be hereafter presented under a claim of right under and through Mrs. Choppin, the sale which will be made in this proceeding will none the less stand.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment of the District Court be and the same is hereby affirmed.

Rehearing refused.

No. 11,460.

JAMES A. HYDE vs. CHARLES H. TEAL.

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ON THE MOTION TO DISMISS.

The affidavit of plaintiff in support of his petition for an injunction places the damages at issue in the suit at over two thousand dollars.

The charge that they are fictitious and inflated to give this court jurisdiction is not sustained by the facts.

Motion to dismiss fails.

ON THE MERITS.

The police jury passed an ordinance changing the direction of a public road.

To annul this ordinance, at the instance of an individual, an interest must be established.

A strip of land between the public road and the landing, to which plaintiff hauled his freight for shipment, is the private property of the defendant.

Before obtaining the right of passing over this strip of land, plaintiff is without interest and can not sustain an action to compel the defendant, acting under an ordinance of the police jury, to remove an obstruction placed on the road which prevents plaintiff from hauling his freight over defendant's land to the landing on the river.

The injunction issued did not restrain; it was suspended *pendente lite*; the damages claimed are therefore not allowed.

APPEAL from the Fourth District Court, Parish of Grant. *Wear, J.*

Robt. P. Hunter Attorney for Plaintiff and Appellant:

The banks of a navigable stream are public property; any one may freely land their boats, tie to the trees growing there; drag nets, deposits goods, etc. Civil Code, Art. 453; 15 An. 544-577; 33 An. 371; 40 An. 253.

There is a servitude of way in favor of the public along the banks of navigable streams for levees and a public road. Civil Code, Art. 695; 35 An. 784; 34 An. 498, 85; 40 An. 253; 42 An. 614; 43 An. 275; 15 An. 544; 33 An. 371; 15 An. 577; 13 An. 129; 10 An. 171, 523; 6 An. 450; 3 An. 482; 14 An. 285.

All roads opened by the Legislature, by the police juries and by private individuals along their fronts are public roads, and can

only be changed by the police jury by appointing a jury of six freeholders, who must be sworn as such. Revised Statutes, Secs. 3368, 3369; Torres vs. Falgoust, 33 An. 560; 3 An. 482; 17 An. 172.

No one may obstruct a public road by building a fence across it, or laying timbers on it, etc. Revised Statutes, Secs. 3379, 3380; Black vs. Towboat Co., 31 An. 497; McDonough vs. Calloway, 7 Rob. 442.

One whose property is enclosed by that of others has the right of egress and ingress to and from the public road or a free water course. Barbin vs. Police Jury, 15 An. 544; 35 An. 784; Railroad Co. vs. McCloskey; Civil Code, Art. 702.

Any person may sue by injunction to prevent another from committing a public nuisance by enclosing a street, road or other public place. Dudley vs. Tilton, 14 An. 281; 7 Rob. 442; 31 An. 497; Torres vs. Falgoust, 33 An. 560; same case, 33 An. 760-6; Stevens vs. Walker, 15 An. 577; New Orleans vs. Gravier, 11 Martin, 620; Goodwill vs. Police Jury, 38 An. 755; 20 An. 226; Gravier vs. Judge, 33 An. 760; Code Practice, Art. 298, No. 4.

The issuance of such an injunction in a prohibitory form is a matter of right and not of discretion with the judge. 7 Rob. 442; McDonough vs. Galloway; Black vs. Towboat Company, 31 An. 497; 31 An. 499; 29 An. 795; 34 An. 784; 33 An. 108; 36 An. 561; C. P. 303; 33 An. 560.

A suspensive appeal lies from an order dissolving the injunction on bond leaving the injunction in force pending the appeal; this is a settled constitutional right. Sentell vs. Judge, 38 An. 31; Sigur vs. Judge, 33 An. 133; 22 An. 512; 24 An. 154; Torres vs. Falgoust, 33 An. 560, 760; 1 N. S. 73; 3 Rob. 103; 11 Rob. 453; 14 An. 57; 7 Rob. 442; 12 An. 455; 22 An. 512.

If a suspensive appeal lies from the order dissolving the injunction on bond, it was a denial of a plain right and of justice for the lower judge, in this case, to suspend the injunction by his mere verbal order, and never allow it to go into effect at all. No authority was or can be shown to justify such a course.

It was and is "adding insult to injury" when on the trial he dissolved the injunction, gave one hundred and fifty dollars damages against plaintiff, as if it had been enforced *pendente lite*, and then refused to plaintiff a suspensive appeal, which would leave the injunction in force.

Hyde vs. Teal.

W. C. Roberts and *Henry Bernstein* Attorneys for Defendant and Appellee:

It is a well settled fact that when a demand for damages is engrafted on the principal demand, and when such demand for damages is fictitious and inflated for the purpose of giving the Supreme Court jurisdiction, the appeal should be dismissed. 38 An. 891, Atwood vs. Cushing; 36 An. 287, March, Tutrix, vs. L. McNeely *et al.*; 34 An. 1025, Kelly vs. Bernstein; 13 An. 336. Rutherford vs. Hennen; 21 An. 745; 9 An. 3; 1 An. 310; 6 An. 735 and 4 An. 213, and authorities therein cited.

Attorney's fees are not recoverable by plaintiff in injunction in the same suit. 28 An. 729, Chapies vs. Preston; 20 An. 573, Bank of N. O. vs. Toledano; 14 An. 701.

Attorney's fees not being thus recoverable can not be computed in calculating the appealable amount. 36 An. 288, March, Tutrix, vs. L. McNeely *et al.*

In determining whether or not the damages claimed are fictitious and inflated the court should look to the nature of the action and the evidence offered, and if it appears therefrom that the damages claimed are vague, speculative and rambling, such claim can not be taken into consideration in computing the appealable amount. 38 An. 801, Manning's unreported cases, Atwood vs. Cushing; 6 An. 735; 4 An. 213, 13 An. 336; Rutherford vs. Hennen.

The value put upon the right claimed by plaintiff in his petition is the test of the jurisdiction of the Supreme Court. 35 An. 785, R. R. Co. vs. McClosky *et al.*

A mandatory injunction can not issue *pendente lite*. 31 An. 497, Black vs. Good Intent Towboat Co.

An injunction can not issue to restrain an act already accomplished. 31 An. 105, Trevene vs. School Board.

A preliminary injunction can not issue to oust one in possession. 36 An. 561, Railroad Co. vs. Railroad Co.; 41 An 951, State *ex rel.* Raymond vs. Judge.

An individual has no capacity to complain of a common injury. L. Digest, p. 310, No. 8, citing 1st Woods, p. 124, Morgan vs. Graham.

The bank of a river or stream, in a legal sense, is "that which contains it in its ordinary state of high water." Revised C. C., Art. 457.

Servitudes imposed for public utility on the banks of navigable streams are regulated by special laws. Revised C. C., Art. 665, 16 A. P. 231.

The only right of passage guaranteed by the law is the right of one whose estate is enclosed to have an outlet to a public road, and even this right is burdened with the charge of indemnification for the damages the party may suffer across whose property the passage goes. Revised C. C., Arts. 669 and 702; Martin *et al.* vs. Patin *et al.*, 16 La., p. 55.

The right of passage should be restricted within those cases coming clearly within the provisions of the law. Martin *et al.* vs. Patin *et al.*, above cited.

The right to the use of the banks of navigable streams granted under Article 455 of the Revised Civil Code is a right of use to the public *when navigating the stream*, and is *restricted* to such uses as are therein specified, "the landing of vessels, drying of nets, etc." 38 An. 415; 12 An. 655; 6 An. 450; 5 An. 37.

The opinion of the court was delivered by

BREAUX, J. There is a landing place on the Red river, about a mile above the town of Colfax, known as Buckeye Landing. The old road from that town to that landing, about the distance just stated, runs along the bank of the river.

At Buckeye Landing this road leaves the bank of the river; turns at right angles, and runs through a lane a short distance, thence parallel to and along the bank of Boggy Bayou.

Plaintiff is a merchant, and Buckeye Landing is the nearest landing to his store.

Since 1887 he receives and ships his freight at this landing, by the boats navigating Red river.

Two or three others, dealers in lumber, shipped lumber from this point.

The plaintiff sought to enjoin the defendant, who is a merchant, to prevent him from fencing this road, and to compel him to remove his fence.

He says that the defendant, moved by business rivalry and jealousy, recently built a fence across the public road leading from his store to the landing on the river, thereby stopping him and the

public from all use of the road to the landing and the landing itself.

The damages alleged, consisting of injury to business, actual loss and other items, aggregating three thousand seven hundred and fifty dollars.

In his petition for an injunction he prays that the defendant be restrained from interfering with his access to the landing, and that he be ordered to remove the fences, and that the sheriff enforce compliance with the order.

The papers were served on the defendant. The sheriff was notified by the district judge not to enforce the writ of injunction.

The defendant in his answer denies that he acted arbitrarily as charged, or that he was actuated by a desire to thwart and annoy plaintiff in his business.

In a motion to dissolve, which was referred to be tried with the merits, he sets up that an injunction will not issue to restrain an accomplished act; that he can not by an injunction be ousted of possession, and that plaintiff is without capacity to champion a cause alleged by him to be public.

The judgment appealed from rejects plaintiff's demands, dissolves the injunction and sets aside the order to remove the fence (the order previously suspended by the judge), and decreed that defendant's reconventional demand be sustained to the amount of one hundred and fifty dollars, damages as attorney's fees.

From this judgment the plaintiff appeals.

On the trial it was shown that the police jury passed an ordinance to authorize the defendant to move the road back some distance.

The change in the road, the defendant contends, was made necessary by the caving banks extending into and taking away a portion of the road.

He also contends that the river at its most extreme flood has never reached Buckeye Landing, and that it is, therefore, not on the bank of the Red river.

The record shows there is a strip of land between the public road and the Buckeye Landing, of some thirty-five or forty yards, *i. e.*, between the road and landing at the point the road leaves the direction parallel to the river and turns at right angles and runs toward plaintiff's place.

It is admitted that the defendant is the owner of the land all the

way from where the new road, referred to in the pleadings, commences, to the town of Colfax, and that his lands extend from the new road to the river, as shown by a map annexed to the record.

The defendant and appellee moves to dismiss the appeal on the ground that the court is without judisdiction *ratione materiæ* and urges that the damages claimed are fictitious and inflated.

ON MOTION TO DISMISS FOR WANT OF JURISDICTION RATIONE MATERIÆ.

The allegations for the injunction are supported by the required affidavit.

Plaintiff represents in his petition that the fences of which he complains effectively obstruct all transportation to or from the landing at which he received freight or from which he shipped produce to the market.

That these obstructions seriously interfered with his business and placed him to considerable disadvantage as compared to those who are more favored in this respect.

Other causes of loss are alleged and supported by his affidavit.

Judged by reference to the premises stated and pleaded by the plaintiff the amount of damages do not appear to have been fixed with the view only of giving this court jurisdiction.

There are items of damages claimed which can not be added in computing the appealable amount.

Sufficient of the damages laid, however, remain to save the demand from being considered entirely unfounded.

The amount thus remaining, in so far as relates to jurisdiction, is within the jurisdiction of the court.

The premises upon which the plaintiff relies may be error, but arguing in support of the grievances he alleges, and assuming for the purpose of testing a question of jurisdiction that the law he invokes bears him out, the court has jurisdiction of the case.

In reference to the damages the defendant claims one thousand and nine hundred dollars.

This does not give this court jurisdiction. It can not be calculated in determining the question of jurisdiction.

But these damages, as claimed, in a measure corroborate plaintiff's jurisdictional allegations.

Arising from the same differences between the parties the amount

claimed by the defendant makes it not unreasonable that plaintiff should claim jurisdiction on the ground that his damages exceed two thousand dollars.

ON THE MERITS.

The gravamen of plaintiff's petition is, the right of shipping freight and receiving freight at Buckeye Landing and of passing over the public roads leading to that place.

The grounds set forth all converge to the maintenance of that alleged right.

Each item of the damages claimed is laid as arising from the obstructions across the public road which prevent access to the landing.

The action of the police jury is assailed in so far as that body may have sanctioned the closing of the road.

If there were no landing at the place on the river, referred to in the petition, the damages would be groundless, for they all point to the alleged injury suffered by plaintiff in his business, not because of the closing of the public road *per se*, but on account of the impediment to his shipments.

He shows no other interest in the public road.

Plaintiff does not sustain the right he claims—that which moved him to bring the suit.

It therefore can not be a matter of any concern to him that the police jury authorized a change in the road over defendant's land.

Should the fence be pulled down, the short distance in the public road, leading to the river, in the direction of Buckeye Landing, would not be of any service to any one, for the strip of land between the road and the landing is an obstacle, in this case, entirely in the control of the owner—the defendant.

If the road ran to the landing, there would then arise an interest that would enable plaintiff to sustain his action.

In Railroad Co. vs. McCloskey, 35 An. 785, to which our attention is directed by plaintiff's counsel, "the defendants had a *right of way to and from the pavilion*," and "that for their purposes they need, and are entitled to, the use of a wagon." (Italics are ours.) The court in that case sustained the claim to a right of way to the pavilion.

In another case, under the same head-note as that under which the case in 35 An. is cited, we are referred to the case of Barbin

vs. Police Jury, 15 An. 544, in which it was held that "when the action of the police jury made the road a public highway, it became subject to the use not only of all the citizens of the parish of Avoyelles, but of the whole State.

This was a controversy between the police jury and a private individual, who sought to obtain compensation for his private road, subsequently established as a public road. The right of the public to use the road was absolute.

In the case at bar the plaintiff seeks to have a road reopened, only that he may be enabled to transport his freight to a landing on the river, which he can not reach if his prayer be granted.

In Torres vs. Falgoust, 33 An. 560, another case cited by plaintiff, the road was a public road, and necessary to the plaintiffs, as part of the public, in the carrying on of their agricultural operations and the transportation of their crops to market. There was no question of passing over land not dedicated to public use.

We have read all the decisions cited.

They do not support the proposition that roads can be ordered reopened so that a particular person may haul his freight over private property to a landing.

A road may be established over private property.

Though it is of little value, that value must be compensated and the right secured in conformity with the provisions of the statutes upon the subject.

The owner without a road to whom his neighbor obstinately refuses a passage over a strip of land ought not to lose, through the caprice or hostility of an unreasonable neighbor. But to prevent the abuse of a principle so delicate in the laws of property, rules are laid down which should be literally followed, in order not to disturb the stability in the right to property. The law gives him a remedy.

The rules have not been complied with by plaintiff and no attempt has been made by him under the law to obtain the right of passage over the private property of the defendant. Article 497 of the Civil Code declares, "that no one can be deprived of his property unless for some purpose of public utility, and in consideration of an equitable and previous indemnity, and in a manner previously prescribed by law."

Granted, that the banks of a navigable stream are public property, and that any one may freely land their boats, tie to trees and de-

posit their goods on navigable streams, that there is a servitude of way in favor of the public along the banks of navigable streams for levees and public roads, and that no one may obstruct a public road by building a fence across it without authority, it does not follow that a plaintiff can have annulled the proceedings of a police jury, changing the direction of a public road, in order that he may retain the privilege of reaching a landing place on a public stream over the lands of private individuals.

These landings may be reached over public roads running to them, but not by passing over the land of private owners.

The road known as the old road—that which was closed under an ordinance of the police jury—did not extend to Buckeye Landing, and therefore did not give to the plaintiff the right for which he contends.

In Denniston vs. Walton, 8 R. 214, the court says: "The lot leased extends from the public road to the water's edge. Whatever space there is between the levee and the road is private property, and the owner is entitled to the exclusive use of it. With respect to the part which extends from the levee to the river, the owner may use it, provided he does not prevent the use of it by others, as regulated by the articles of the code referred to and in conformity to the police regulations"

This principle is iterated in Carrollton R. R. Co. vs. Winthrop, 5 An. 36.

The record discloses that the banks of the river at this point are above the ordinary state of high water, and that the landing above the bank does not extend to the old road.

The space between the road and landing is private property, and not subject to the right claimed.

This intervening land is not part of the banks, nor a part of the road. Without a servitude of way over that strip plaintiff has no cause of action; there are no approaches to the landing subject to right of way.

THE INJUNCTION.

The demand of plaintiff has been considered by us without reference to the injunction to which it was an incident.

It was possible to dismiss the injunction or suspend its effect without touching the main demand.

The injunction contains two demands—the principal one and the

conservatory demand. The latter may be dismissed without necessarily carrying with it the dismissal of the former. Knox vs. Coroner, 13 An. 88.

In the case at bar there was not a dismissal, but an absolute suspension of the order after it had been issued.

The injunction did not affect anything; it was null in its effect; an injunction that did not restrain.

In Beer vs. Dirmeyer, 28 An. 136, the court granted a rule *nisi*, and after hearing depositions on each side refused to grant the injunction sued for.

No rule *nisi* was issued in the case under consideration, but immediately after having granted the order of injunction an order was issued to prevent its enforcement; in effect operating as if it had been refused in the first instance on a rule *nisi*.

The controlling reason in the cited case applies in the present case.

The principal demand remained and was decided.

The court refused to grant a suspensive appeal to the plaintiff, and thereby enable him, so far as is related to the injunction, to make it effective *pendente lite*. It remains suspensive as originally ordered.

The defendant has no right to the damages allowed to the defendant in reconvention, and in that respect the judgment must be amended.

It is therefore ordered, adjudged and decreed that the judgment herein be amended by rejecting the reconventional demand for one hundred and fifty dollars and by striking out this amount allowed to the defendant in the judgment appealed from, and that as amended it be affirmed, and that the defendant and appellee pay the costs of appeal.

Rehearing refused.

No. 11,524.

STATE OF LOUISIANA VS. NORA OLIVER.

The rule is well established in criminal cases, in matters of applications for new trials, that the affidavit alone of the applicant is not sufficient. It must be supported by the affidavits of others, and, when possible, by those of the newly-discovered witnesses.

APPEAL from the Sixth Judicial District Court, Parish of Richland. *Ellis, J.*

M. J. Cunningham, Attorney General, for State, Appellee:

This appeal presents no question of law which would justify this court in reversing the sentence and judgment appealed from. Applications for new trials in criminal cases are addressed to the judicial discretion of the presiding judge, whose action will not be reviewed unless that discretion is clearly abused, to the injury of appellant. In this case the application appealed to the equitable consideration of the judge, who doubtless gave due weight to the reasons urged, and is presumed to have refused the application because he was satisfied from his knowledge of the case that it was without merit.

Robert Whetstone Attorney for Defendant and Appellant filed brief, citing: 8 R. 529, 535, 583; 30 An. 536; 34 An. 100; 10 An. 25; 31 An. 191, 346, 482; 36 An. 87; 29 An. 589; 38 An. 608.

The opinion of the court was delivered by

NICHOLLS, C. J. The only question submitted to us in this case is the correctness or incorrectness of the action of the district judge in refusing defendant a new trial.

It is well settled that applications for new trial in criminal cases are addressed to the sound judicial discretion of the presiding judge, whose conclusions will be sustained unless manifestly wrong. There is nothing in this case calling for a reversal. The application rests entirely upon defendant's own affidavit.

In State vs. Washington, 36 An. 341, we said: "Applications for new trials in criminal cases on the ground of newly discovered evidence must always be received with caution. The inducements to false swearing on the part of the person convicted are obvious, and therefore the rule is well established that his affidavit alone will not suffice. It must be supported by affidavits of others, and when possible by those of the newly discovered witnesses. The mere statement that the accused did not know of the testimony in time to have brought it forward is not sufficient." Expressions of similar import will be found in State vs. Cotton, 36 An. 980, and in 36 An. 87, State vs. Hyland.

Judgment affirmed.

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No. 11,166.

STATE OF LOUISIANA VS. CHARLES C. BUCK AND THE PLAQUEMINES TROPICAL FRUIT COMPANY.

1. Notwithstanding property in dispute in a petitory action be situated in the parish of Plaquemines, the Civil District Court of the parish of Orleans acquires full and complete jurisdiction *ratione materiæ et personæ* if the parties claiming ownership be *personally* cited therein—same being citizens of another State.
2. An exception to the jurisdiction of the court *ratione personæ* to be availing must be tendered *in limine* and disencumbered by any other issue.
3. No one can acquire title to any part of the public domain by the prescription *acquirendi causa*.
4. A patent for public lands reciting that a named party has purchased all the unsurveyed sea marsh in a certain township and range, west of the Mississippi river, excepting certain surveyed lots situated on the river, containing a certain number of acres, and extending back to a certain named bay, according to the official plat of the survey of said lands, in the State land office, does not evidence a sale *per aversionem*.
5. The title to alluvion is a purely accessory right attaching exclusively to riparian proprietorship and incapable of existing without it.
6. The very object, purpose and scope of Act 104 of 1888 is to authorize the register of the State land office to cancel the entry last made when there are two conflicting patents outstanding to the same identical land. It does not confer upon him authority to hear and determine such a controversy as this.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe, J.*

M. J. Cunningham, Attorney General, for State, Appellee.

Henry J. Leovy of Counsel:

Declinatory exception is a dilatory exception. Code of Practice, 331. Declinatory exception declines "the jurisdiction of the judge before whom it is brought."

All dilatory exceptions must be pleaded before *issue joined*. C. P. 33 declares, in referring to dilatory exceptions, "in any case they must be pleaded *in limine litis*, nor shall such exceptions be allowed *in any answer* in any cause."

"All dilatory exceptions are waived by answer." Cross on Pleadings, pp. 123, 162.

"A plea of jurisdiction is waived by one to the merits." Hennen, p. 1162, No. 2.

An exception to jurisdiction must be pleaded *in limine*. Hennen, 1166, No. 5; 31 An. 88; 39 An. 624.

Defendant can not plead singly different technical objections. After exception to citation he can not plead domicile. 13 An. 409.

All dilatory exceptions must be pleaded before *default*.

"Hereafter no dilatory exceptions shall be allowed in *any case* after judgment by default." C. P. 333.

"The plea of discussion is a dilatory exception, and can not be pleaded after default." 34 An. 96.

"No dilatory exception can be pleaded after default, which is equivalent to issue joined." Hennen, 1163, No. 5; 15 An. 184.

"Plea to jurisdiction is too late after default." 15 An. 184.

The filing of a dilatory exception, or plea to the jurisdiction, *and* an answer to the merits in the same paper, is *a waiver of the dilatory* exception."

Art. 333, C. P., referring to dilatory exceptions, says: "Nor shall such exceptions hereafter be allowed in any answer in any cause."

A dilatory exception can not be pleaded *with* the answer. 34 An. 962, Chaffe vs. Ludeling.

"Dilatory pleas must be tendered and *disposed of in limine*, and can not be legally embodied in the answer." Robbins vs. Martin, 43 An. 488.

"The answer also includes other matters of exception, dilatory and *declinatory* in character, which need no other mention than to say they should have been separately urged and disposed of *before* issue was joined on the merits, and this course not having been pursued, *they were waived*." *Ibid.*

"Going into the trial without objection on discussion of plea to the jurisdiction is a waiver of the exception."

"Defendant not insisting upon his exception being tried first and passed upon by the court, it must be considered as being waived." 32 An. 1146.

Judgment against defendant rendered out of his domicile is valid if he appears or pleads to the merits. 32 An. 1146; 39 An. 627; 40 An. 493.

Exception is waived by going to trial without insisting on decision on the exception. Cross on Pleadings, p. 124, Sec. 107.

One who proceeds to trial without asking for judgment on his plea to

the jurisdiction, waives it. Hennen, 1165, No. 1; 34 An. 963; 15 An. 188; 24 An. 254; 33 An 438; 34 An. 301.

The authority of a public officer depends on the law as it is when he acts. He has only such power as the law specifically granted. 101 U. S. 698; 131 U. S. 173; 5 An. 516; 44 An. 215. The register of the iand office can not sell land for less than the price fixed by statute, nor sell more land than is paid for.

When lands are granted according to an official plat, the plat itself becomes as much a part of the grant or deed, so far as limits are concerned, as if it were written out upon the face of the deed. 128 U. S. 691.

The boundaries and quantity of land granted by a patent must be ascertained by the descriptive language in the patent itself (20 Howard, 372). The number of acres stated in the patent and the price paid fix the quantity of land sold.

Batture or accretion formed at the time of a sale is not included in the sale unless expressly included in the deed. Ferriere vs. City, 35 An. 209; 8 N. S. 572; 11 La. 140. Nor can batture owned by the State be transferred except by sale, at a price fixed by law.

Owners of land are not entitled to accretion formed in the rear of their land. It is only on running streams that batture rights exist. C. C. 504, 509; 34 An. 837; 35 An. 209; 6 N. S. 216; 12 La. 324; 18 La. 122; 143 U. S. 366.

Swamp lands acquired by grant from the United States can not become subject to private ownership, because, by deposit of sediment, they have been elevated above the water.

A sale *per aversionem* only conveys all land between designated boundaries. Where there are defined boundaries there can be no claim *per aversionem* beyond them. C. C. 826, 854, 2494; Hennen's Dig., p. 1339; 16 La. 185.

The act of 1888, p. 169, provides for the issuance of warrants to holders of patents erroneously issued. It gives no right to the holder of valid patents to remove alleged clouds from their titles. The Land Register has no judicial power under said act to settle controversies relating to conflicting claims. The State can not be affected by the acts of officers beyond the power vested in them by law.

Prescription can not be pleaded against the State. Illegal possession of public lands vests no right whatever. 11 M. 210; 9 R. 288;

115 U. S. 413; 6 R. R. 482; 43 An. 225; Hennen's Digest, p. 121, No. 6; Bushnell on Limitations, p. 147.

In suits for *damage actually done* in case of trespass and slander of title, it is not necessary to allege possession in the plaintiff. Cooley on Torts, p. 332; Abbott's Trial Evidence, p. 635; Boone on Code Pleading, p. 421.

Gurley & Mellen Attorneys for Defendants and Appellants:

The courts of the parish of Orleans have no jurisdiction over a petitory action concerning land situated in the parish of Plaquemines. The fact that the defendant is a foreign corporation which has not declared the locality of its domicile, or the name of its agent or officer in the State upon whom service of process can be made, but is carrying on business and has an officer and employés in the parish of Plaquemines, does not enable the courts of the parish of Orleans to acquire jurisdiction by service upon the officer of the corporation when temporarily in the parish of Orleans. Act 149 of 1890.

The decision of the Register of the Land Office on April 24, 1889, rendered under authority of Act 104 of 1888, in favor of Patent No. 526, and canceling subsequent patents issued for lands within the boundaries designated in Patent No. 526, is conclusive of defendants' right under said patent to all lands within said designated boundaries, and plaintiff is stopped from now questioning said decision. 138 U. S. 573; 93 U. S. 169; 121 U. S. 488; 139 U. S. 163; Abbott's Nat. Digest, Vol. 3, p. 797, title "Public Lands," pars. 16, 27, p. 596; 91 Cal. 158.

The State is not excepted from the effects and operation of the statutes of prescription, when it appears in a court of justice, defendants and those from whom they acquired title have been in possession, in good faith, under a just title translative of property, and exercise the rights of ownership upon and concerning the lands within the limits defined in the Patent 526, for more than twenty years, and this action is barred by prescription. C. C. 3521, 3478 *et seq.*; 9 An. 137; 23 An. 570; 30 An. 562.

Patent No. 526 is a sale of "all the unsurveyed sea marsh" within fixed boundaries, the lines of township 21 south, ranges 30 and

31 east, in the Southeast Land District of Louisiana, west of the Mississippi river, extending back to West Bay, excepting there from the lotsfronting on the river and section 16 in both ranges.

The expression "containing 1320 acres" in said patent is merely an estimate and is controlled by the fixed bounds, and the patent conveys all the land between those bounds, save that specially excepted.

The printed words "according to the official plat of the survey of said lands in the State Land Office" are meaningless. There can be no official plat of the survey of unsurveyed sea marsh. C. C., Arts. 854 and 2495; 29 Ill. 392; 83 N. Y. 518; 95 U. S. 551; 9 Cranch, 173; 3 How. 187; Eng. and Am. Ency. of Law, Vol. 2, pp. 499 and 500; 3 Me. 71; 10 Iowa, 249; 13 Pick. (Mass.) 145; 27 Barb. (N. Y.) 196; 48 Mo. 325; 50 Cal. 439; 21 How. 306; 3 Rob. 188.

The area of land between the defined boundaries, less the exceptions designated, did not exceed 1320 acres at the time of the issue of Patent 526, 30th of September, 1869. It consisted of tongues of land extending back to West Bay, as well as the sea marsh adjoining the lots fronting on the river.

The increase in the area of land within the defined boundaries has taken place since the issuance of Patent 526, and is alluvion, gradually formed solely by the sediment of the Mississippi river, and belongs, by right of accretion, to the land to which it was attached. That land was subject to diminution and gradual loss, and is entitled to the gradual gain. C. C., Art. 599; 10 Peters, 662; 23 Wall. 46; 6 Martin, 216; 10 Rob. 99; Succession of Delachaise vs. Chas. B. Maginnis, No. 10,957, Supreme Court of Louisiana, not yet reported; Eng. and Am. Ency. of Law, Vol. 1, p. 137; Gould on Waters, 2d Edition, pp. 311 and 312, par. 155; Laurent, Principes du Code Civil Français, No. 6, and p. 375.

Latourettes' and Bradford's maps, offered by plaintiff, are shown by the United States Coast Survey Chart of 1884, and the Surveyor General's and United States Land Office certificates, to be incorrect.

Where defendant is cast in an action in which his vendor is called in warranty there must be rendered at the same time a judgment in favor of the defendant against his warraetor. C. P., Art. 885.

E. Howard McCaleb Attorney for Warrantor:

Warranty in a contract of sale only takes place in case of eviction. R. C. C., Art. 2500 *et seq.* Where the plaintiff does not seek to evict defendant, but its sole contention is as to the extent, quantity and boundaries of defendant's lands, under its title, defendant's vendor is not liable in warranty.

Where a deed refers to other deeds the description of the latter will by such reference become a part of the former, and has the same effect as if inserted in the subsequent deed. Tiedeman on Real Property, par. 841; 9 Rob. 30.

Thos. J. Semmes and *Duane E. Fox* on Application for Rehearing:

The land conveyed by the State was unsurveyed, and therefore the words "according to the official plat of survey" can not properly be held to mean or imply that the land conveyed by said patent was actually surveyed.

We wish particularly to call the attention of this court to the construction by the Supreme Court of the United States of the words "according to the official plat of survey," in a patent issued by the United States, and to the construction of the patent by the court where, as in this case, the survey may not correctly delineate the true line of division between the land conveyed by patent and the adjacent water.

The form of expression "according to the official plat of survey" has been in use in the public land system of the United States from a very early date. It has been borrowed and followed by the various States which acquired lands from the public domain of the United States, and so it is found in the patents issued by the State of Louisiana. The construction of that phrase, therefore, by the Supreme Court of the United States is entitled to the greatest possible weight. Hardin vs. Jordan, 140 U. S. 371; Mitchell vs. Smale, *Id.* 406.

The opinion of the court was delivered by

WATKINS, J. Claiming as owner, certain lands situated in the parish of Plaquemines, on the west side of the Mississippi river,

being the whole of township twenty-one (21) south, ranges thirty (30) and thirty-one (31) east, containing more than thirty thousand acres—same being what is commonly denominated as swamp and overflowed lands—plaintiff's averment is, that she acquired same, in its entirety, except the front lots which were previously sold off by the United States government, and the sixteenth sections which were dedicated to the public schools, "and also excepting a tract of land between said lots, and what is known as 'West Bay,' as per plan in the State Land Office at Baton Rouge, said excepted tract being one thousand three hundred and twenty acres, which, it is alleged, was sold by the State of Lousiana in September, 1869, by patent No. 526, to C. C. Packard, but which, though not claimed in this suit, petitioner does not admit was sold."

Petitioner further alleges that she acquired said lands by grant and donation from the United States government by act of Congress approved September 28, 1850, entitled an act to enable the State of Arkansas and other States to drain the swamp lands within their limits; and other laws on the same subject.

The further allegation is made that Charles C. Buck, of Baltimore, Maryland—but, at the time of filing suit, in New Orleans—and the Plaquemines Tropical Fruit Company, said to have been incorporated under and by virtue of the laws of New Jersey, of which Charles C. Buck is president, have, themselves and through their agents and officers, maliciously and without probable cause denied petitioner's claim of ownership, and have slandered its title thereto, by setting up title in themselves, as derived from Robert M. White, who claims to have acquired same through C. C. Packard, who obtained therefor patent No. 526 from the State of Louisiana in 1869, "whereas said patent, to the knowledge of said defendants, shows no such sale or transfer."

That they are still continuing to slander and maliciously defame petitioner's title to said land, and have recently stated and represented that said company was the owner of same, and that plaintiff possessed no title to any part of it; and that such statements had recently been made to different parties in the city of New Orleans—parties who had applied to the land officers of the government for its purchase.

That upon this allegation of slander of the petitioner's title, claim is made for one thousand eight hundred dollars damages.

Further allegation is made that the defendant, Buck, has been and now is trespassing on said lands, cutting and removing timber therefrom, digging ditches, and otherwise destroying portions of said property and greatly impairing its value, thus causing petitioner great and irreparable injury, making an injunction necessary for the protection of her rights.

Plaintiff's prayer is for citation to and service on each of the two defendants, commanding them to appear and answer her demands in the Civil District Court, in the parish of Orleans; that a writ of injunction issue restraining and prohibiting them from slandering her title, and from trespassing upon her lands, or taking, or keeping any part of same in their possession, "and from interfering in any manner with the possession of the petitioner and (her) full exercise of ownership over (the whole) of said lands;" and that the defendants be condemned to pay the sum of one thousand eight hundred dollars as damages for the slander of her title.

The defendant, Buck, excepted *in limine* that plaintiff's petition discloses no cause of action; and, pending trial and final disposition of same, both defendants joined in a further exception to the jurisdiction of the court, *ratione personæ*, because of their domiciles being in New Jersey and Maryland, respectively, and beyond the reach and authority of the same. Both of said exceptions were taken together, tried and overruled.

In their answer the defendants allege that the company is in full and complete possession of the property in controversy, and that the injunction wrongfully issued, reserving the benefit of their exceptions.

Subsequently the plaintiff amended her petition, first reiterating the various charges of her petition, averring the falsity of the defendants' claim of ownership, as derived through Louque, White and Packard, declaring that the alleged false and slanderous statements of the defendants constituted a cloud upon her title, and that she had suffered damages to the extent of two thousand dollars on account of their trespass—claiming judgment for the total sum of three thousand eight hundred dollars. It is concluded by a prayer to the effect that she be recognized as owner of the land described in her original petition and quieted in possession thereof. There being no prayer in said supplemental petition for citation to the defendants, a second supplemental petition was found necessary for that purpose.

To these two supplemental petitions the defendants excepted—though subsequent to default being taken—to the effect that the court was without jurisdiction to hear and determine the cause, because the land alleged to have been trespassed upon, and of which plaintiff seeks to be declared the owner and put in possession, is wholly situated in "parish of Plaquemines, of this State, and neither of defendants reside within the jurisdiction of this Honorable Court, and each one of them has a domicile in the said parish of Plaquemines, and hence (they) specially plead the want of jurisdiction of this Honorable Court."

And subject to said plea, and without waiving the same, the defendants made further answer, and averred "that all of the unsurveyed sea marsh in township 21 south, ranges 30 and 31, lying west of the Mississippi river and Grand Pass in the parish of Plaquemines, except certain lots of small depth fronting on the Mississippi river, and section 16 in ranges 30 and 31 (school sections) was sold and parted with by plaintiff for a valuable consideration, in 1869, to O. C. Packard, and that the right to all accretions passed with said sale"—then follows a delineation of the claim of title as above set forth.

Then follows a circumstantial and detailed account of the circumstances under which the defendant company acquired the ownership of the territory in dispute, and of the care exercised and examinations made, antecedent to making the purchase—alleging that it acted in so doing upon the faith it had in the acts and representations of the land officers of the State government.

They pray that their vendor, Louque, be cited in warranty, and for trial by jury; and, on final trial, for verdict and judgment in favor of the defendant company, decreeing it to be the owner of said lands; or, if there be judgment in favor of the plaintiff, their prayer is for like judgment against their warrantor, Louque, in the alternative.

Louque appears and answers defendants' call in warranty, and disavows having had any personal interest in the land transaction; and alleges that it was made by him, at the request of the defendants, and that he purchased said property for them, and immediately after taking the title he transferred it to them before the same notary.

That he purchased from R. M. White, who is bound to him in warranty, and should protect him in every and all particulars.

Thereupon he prays that the call in warranty of the defendant company be dismissed as to him, in so far as it may have, in any manner, a tendency to make him responsible; and that, in the alternative that same should be maintained, he have judgment against his vendor, White, whom he calls in warranty.

He also prays that the Mutual National Bank and the Metropolitan Bank be cited, and, after due proceedings, that there be judgment, in the alternative of the plaintiff's recovery, ordering the surrender of certain notes now in their possession that evidence portions of the purchase price of the property, and requiring the same to be canceled, as being null and void.

The warrantor, White, answered in turn and plead a general denial; and, subsequently, the banks appeared and denied liability, and disavowed possession of the notes they were alleged to have.

The defendant company pleads the prescription of five and ten years, *acquirendi causa*, predicated upon its peaceable and undisturbed possession, under title, in good faith, as a muniment of its ownership; and both defendants plead various acts and proceedings of the land officers of the State government as an estoppel against the demands and claims of the State.

On final trial there was a verdict and judgment against the defendants, recognizing the ownership of the State, reserving the rights of the defendants and Louque against White, warrantor, and making the writ of injunction perpetual.

It is from this judgment that the defendants have appealed—it awarding plaintiff no damages, and she having made no answer to the appeal claiming anything on that score, there is nothing for us to decide except the question of title.

Question was made in the lower court and it was renewed on the argument in this court to the effect that the Civil District Court of the parish of Orleans did not have jurisdiction *ratione materiæ et personæ* of the defendants, or of the property in controversy—it having been considered untenable by the judge *a quo*.

After carefully analyzing the pleadings, we have reached the conclusion that the defendant's exception is not well taken.

Considering and treating this as a petitory action from its incipiency—and this view is the one most favorable to the defendants—we are of the opinion that it was correctly instituted in the parish of Orleans, notwithstanding the *res* is situated in the parish of

Plaquemines, the defendant, Buck, having been *personally* served with citation while temporarily abiding in the city of New Orleans, and he being at the time president of the defendant company, and both being citizens of other States than Louisiana.

An action in revendication of real estate may be brought within the jurisdiction where the property is situated, or that where the defendant has his residence, as the plaintiff chooses. C. P. 163. Hence the defendant has no right to insist upon the suit being brought in the parish of Plaquemines, and no cause of objection that it was not.

The plaintiff had the choice to locate the suit at the defendant's personal domicile.

A further provision of the law is that "when the defendants are foreigners, or have no known place of residence in the State, they may be cited wherever they are found." C. P. 165, No. 5.

Considering the question from the standpoint of the defendant's personal domicile, it is clear that they had no place of domicile or residence in the State that was *known to the plaintiff at the inception of the suit.*

The property in controversy being situated in the State, and the defendant, Buck, being temporarily present in the parish of Orleans, it was competent for the court of that jurisdiction to cite him to appear and answer therein; and he being the president of the defendant company, it could be likewise cited into court.

But if this be considered and treated as a question of doubt, we think it should be resolved against the defendants, because the defendant, Buck, first appeared and excepted that the plaintiff's petition disclosed no cause of action, and thus voluntarily submitted himself to the jurisdiction of the court; and he being at the same time the president of the defendant company, its right of subsequently excepting to the court's jurisdiction is rendered exceedingly doubtful; particularly as the two defendants united in one exception, and it was engrafted upon and tried and decided with the plea of no cause of action.

The well-defined theory of our jurisprudence is, that the exception of want of jurisdiction *ratione personæ* to be availing must be presented *in limine* and *alone*, and altogether disconnected with and disembarrassed by any other averment of fact which indicates the joining of issue. If any other issue be conjointly tendered with such exception, it must necessarily fail.

In so far as the similar exception that was tendered to the supplemental petition is concerned, we consider it immaterial, for the reason that the plaintiff was not bound to institute the suit in the parish where the property is situated.

The plea of prescription that is urged by the defendants is unavailing. Their claim of title is founded upon the Packard patent, as is clearly shown by their answer, their averment being "that all of the unsurveyed sea marsh in township 21 south, ranges 30 and 31, lying west of the Mississippi river and Grand Pass, in the parish of Plaquemines"—less certain exceptions enumerated—"was sold and parted with by the plaintiff for a valuable consideration, in 1869. to C. C. Packard, and the right to all accretions passed with said sale," etc., and they claim to have derived title through Packard. Therefore the plea of prescription can not confer title *beyond* the calls of the patent, as nothing can conclude the right of the State government other than a *bona fide* and actual sale—though such accretions as may subsequently accrue may possibly attach thereto. No one can acquire title from the State by prescription. It is a condition precedent to the acquisition of title by prescription *acquirendi causa* that the property should have been severed from the public domain and transferred to that of private ownership, at the date such prescription commenced to run.

In Sanchez vs. Gonzales, 11 O. S. 207, we find this proposition broadly stated, thus:

"It is believed that we may safely assume, as a general rule of prescription, that the public domain is not subjected to it by any length of time."

But in that case there was no question of title derived from the State government, but of one derived from the Spanish crown.

In Pepper vs. Dunlap, 9 R. 283, the case of Sanchez was quoted approvingly, the court declaring that they knew "of no law which establishes the *presumption* of a grant of any part of the public lands."

However, some doubt was created by a *dictum* of the court in same case as reported on a subsequent trial (9 An. 137) by the following language of the court, viz.:

"Prescription is one of the modes of acquiring property by the effect of time and under the conditions regulated by law. R. C. C. 3420 (old number).

"There are no other prescriptions than those established by the code. Art. 3433.

"Prescription runs against all persons, unless they are included in some exception established by law. *Id.* 3487. * * *

"Under the Spanish law property could be acquired by prescription against the crown. At least we find no exception in its favor nor any principle which prevents the operation of the laws of prescription. * * * * * * *

"Under our code we find no express exception in favor of the State."

But in a later case—McCastle vs. Chancy, 28 An. 720—a contrary opinion is expressed, placing titles derived from the State government upon the same basis as those derived from the United States government. That was a petitory action, plaintiff claiming title from the State of Louisiana under an act of Congress of date May 20, 1826, and demanding that the patent issued by the United States to the defendant be declared null and void, as having been issued in error. The court accepted the plaintiff's view of the case and decided that the patent issued to the defendant was erroneous, but declined to maintain the latter's plea of prescription, employing the following language, viz.:

"The United States parted with their title when the selection was made by the State of Louisiana, in 1856, and the title remained in the State until it was vested in the plaintiff. Consequently no title vested in Chancy, the patentee; but we think, *while he could not prescribe against the State, or United States*, he was such a possessor as to require the plaintiff either to reimburse the value of the materials," etc.

The question treated of in Graham vs. Tignor, 23 An. 570, and State vs. White, 23 An. 733, was that appertaining to the prescription *liberandi causa*, as extinguishing an *action* by the State for the recovery of a debt; and the opinion therein expressed by the court does not militate against that announced in McCastle's case.

Those cases were examined and compared in our opinion in Reed vs. Creditors, 39 An. 115, in which we had occasion to express the following views, viz.:

"Prescription proceeds upon the theory that one in whose favor a right once existed has lost recourse for its enforcement judicially, by reason of his own neglect for such a length of time that it would be against equity to permit its assertion.

"Such an equity can not arise in favor of the subject as against the sovereign by reason of the failure of her officers to perform their duties.

"Certainly not, unless the Legislature has so declared in unmistakable terms."

To this proposition we feel disposed to adhere, as we consider it sound as well as conservative, and in keeping with the views entertained by our predecessors in the McCastle case.

Entertaining this view, we must restrict the defendants to the title which is evidenced by the patent of their vendor, and such accretions as may have been added to the land since the date of its issuance.

On the merits, the substantial facts in controversy are these:

(a) In 1869 the State, through the register of its land office, issued to one C. C. Packard a patent certificate to certain lands which are in contest, which contains the following recitals, viz.:

"Whereas C. C. Packard * * * purchased, per warrant No. 380, N. S. D., dated September 29, 1869, the following described swamp land, subject to tidal overflow, viz.: *All the unsurveyed sea marsh in township 21* S., ranges 30 and 31 E., in the Southeastern Land District of Louisiana, west of the Mississippi river, *excepting lots fronting on the river, and sections* sixteen in both ranges, containing *thirteen hundred and twenty acres* (1320), extending back to West Bay, according to the official plat of the survey of said lands in the State land office;" it being dated 30th of September, 1869.

(We have quoted from the certified copy made by Fremaux, register, on the 6th of January, 1882, as the oldest of the three in evidence and brought up in the original.)

This patent bears the signatures of the governor and the register of the State land office, and it is thus prefaced, viz.:

"The State of Louisiana (seal), Patent No. 526," etc.

(b) An extract from the books of the land office—that is to say, the stub from his warrant book which shows that warrant No. 380—mentioned in the patent—was issued to C. C. Packard on the 29th of September, 1869, and covers the quantity of 1320 acres of "unsurveyed sea marsh back of lots fronting on the river," in township twenty-one (21) south, ranges 30 and 31 east. It also shows that the the amount paid therefor was three hundred and thirty dollars, or twenty-five cents per acre. This data corresponds with the recitals of the patent, and is contemporaneous in date therewith—the one fully identifying the other in every particular.

(c) A certified extract furnished by the register exhibits the *locus in quo*, as it was in 1836, when surveyed by G. F. Connelly—this exhibit having been taken from an approved map on file in his office. It shows the excepted lots fronting on the river, as well as the area that is covered by the Packard patent, it being thus delineated, viz.:

"Certificate No. 380, N. D. S. Sea marsh. C. C. Packard. Patent No. 526, N. S. D."

Immediately east of the sea marsh thus indicated is the outline of the river, whilst on the west and in the rear of it are written the words "*West Bay.*"

(d) A sketch accompanies a certificate from the Surveyor General indicating the original United States surveys as they appear on the map in his office, and they show that township twenty-one (21), ranges thirty (30) and thirty-one (31), are, in greater part, covered by West Bay, which is given the appearance of an arm of the Gulf of Mexico, extending south on an irregular line almost parallel with the course of Southwest Pass.

On the trial the introduction of evidence took a very wide range, and this necessitated elaborate argument and briefs on both sides of the controversy; but, in our opinion, the greater part of it was unnecessary for the determination of this, a purely petitory action, depending, primarily, upon a proper construction of the patent that was issued to the defendant.

We think it evident from a fair consideration of the patent, taken in connection with the official *data* we have referred to, that it does not evidence a sale *per aversionem*, but one by measure or quantity.

It has been determined that in order "to constitute a sale *per aversionem* there must be certain limits, or a distinct object described, as a field enclosed, or an island, because it is presumed the parties have their attention fixed rather on the boundaries than the enumeration of the quantity." 12 M. 428; 7 An. 672.

Again: "That the sale of a body of land as a *section*, which has limits mathematically fixed and established and generally known, is not a sale *per aversionem*." Phelps vs. Wilson, 16 La. 185.

Again: "A sale in which specific boundaries are given is a sale *per aversionem*, or a sale from one fixed boundary to anoth r, which includes all the ground between the parties mentioned, whether the

measure be correctly stated or not, the calls for a boundary controlling the enumeration of quantity." 18 La. 526; 19 La. 422; 1 R. 34; 2 R. 357; 9 R. 30.

Again: "The sale of a certain number of acres between certain limits 'so as] to include the said number of acres,' is not a sale *per aversionem*, but of the number of acres specified." Hoover vs. Richards, 1 R. 34.

To constitute a sale one *per aversionem* the property should be designated by adjoining tracts, or from boundary to boundary. Hall vs. Nevill, 3 An. 326.

In case the *upper* boundary be given with sufficient certainty, yet no *lower* one is mentioned, it is not a sale *per aversionem*. Boyce vs. Cage, 7 An. 672.

Our code declares that "there can be neither increase or diminution of price on account of disagreement in measure, when the object is designated by the adjoining tenements, and sold from boundary to boundary. R. C. C. 2495.

The sale to the defendant's author was not made by certain, and particularly designated, fixed, natural and well-known boundaries of lands included within the boundaries indicated.

A careful examination of the patent will show that only two boundaries are given, and those only imperfectly, viz.: (1) "All the unsurveyed sea marsh in township 21 S., ranges 30 and 31 E., * * * west of the Mississippi river, * * * extending back to West Bay," etc.—nothing being stated in reference to the north or south boundary. Nor is this all; for there is a further limitation placed upon *both* of the foregoing limits, thus: (1) "All the unsurveyed sea marsh, etc., * * * west of the Mississippi river, *excepting lots fronting on the river*," etc.; and (2) "extending back to West Bay, *according to the official plat of the survey of said lands in the State Land Office.*" So it appears that the Mississippi river was not indicated as the eastern boundary, but the surveyed lots fronting on the river were described as intervening between the river and the land conveyed, and *their* dimensions are not given. And it also appears that West Bay, *as it existed at date of patent*, was not mentioned as the western boundary, but the western boundary was described as, in general terms, "extending back to West Bay, *according to the official plat of the survey of said lands in the State Land Office.*"

It certainly can not be said that the boundaries given were, in any proper sense, *certain* limits, definitely fixed. The patent issued to Packard did not convey all the land between adjoining tenements; and it is of no consequence that reference is had to the township and ranges in which the land is situated, because they are mathematically fixed, established, and well known limits. The sale was made of all the unsurveyed sea marsh in township twenty-one south, with certain exceptions, containing thirteen hundred and twenty (1320) acres; and which, according to the official plat in the land office, extended back to West Bay, *as it once existed.*

This is evidently a sale by measure. Considering the fact that it was a sale, or entry of public land—property of the State of Louisiana—made by a public official, in pursuance of special laws governing their alienation, how could it be a sale *per aversionem?*

But the register sold thirteen hundred and twenty acres of land, at twenty-five cents per acre, and that is the quantity the patent conveyed to Packard, and no more.

Consequently, the claims of defendants must be restricted to the calls of the patent, unless they have been extended or increased by accretion.

Without entering into the elaborate details of the evidence applicable to the question of accretion *vel non*, it will be sufficient to state that it substantially shows that the lands are situated in the parish of Plaquemines, on the west bank of the Mississippi river, about twelve miles above the passes. That anciently the waters of West Bay spread over the greater part of said lands—extending up from the Gulf of Mexico as "an arm of the sea;" but that, within the past half-century, they have been increased in elevation and extended in area, and made comparatively high by sediment that has been periodically deposited thereon by annual swells of the Mississippi river.

That this process of elevation began about the year 1836, when a crevasse occurred in the banks of the river at a fisherman's canal, then known as Gilbert's Canal, but ever since that time known as the "Jump."

That a United States surveyor made a survey of the land fronting on the river in 1836, and divided same into lots, and located the sea marsh, as it then existed, in the rear of said lots, in the direction of West Bay—same not extending back more than thirty (30)

chains (say two thousand feet), at its greatest depth, and averaging not more one thousand feet; that is to say, to the waters of West Bay.

These facts are in keeping with the recitals of the Packard patent, and the maps, plats and profiles of the land office, we have referred to.

In order to furnish a more accurate idea of the *locus* we have made the subjoined extract from one of the briefs of defendants' counsel, quoting from the testimony of E. L. Corthell, a civil engineer of great skill and repute, viz.:

"I have a knowledge of the 'Jump,' a crevasse leading out of the Mississippi river, and of the lands in said 'Jump.' My knowledge is from personal examination and observation made at sundry times, from May, 1875, to July, 1888. During that time, particularly during the first five years of that period, my business as the resident engineer in charge of the construction of the South Pass Jetties and as superintendent during a large part of this time of said works, required my presence in the 'Jump,' where the materials in the shape of willows were obtained for the construction of said works. The land on which the willows grew was formed by deposits of sediment from the Mississippi river. The quantity of the said lands thus formed through this crevasse I can not state. It must have been more than six thousand acres, for this was the amount of land which Capt. James B. Eads, or a company which he represented, surveyed and obtained for the purposes of cutting the willows for the jetties.

"From what I consider reliable information, obtained while engaged in my business above mentioned, and particularly while gathering information for writing the history of the Mississippi Jetties, the formation of the land began in its recent development, about the year 1835, by the river, at an unusual flood, breaking through a small fisherman's canal, pouring its waters through a very large crevasse, estimated to be at that time over one thousand eight hundred feet wide and sixty feet deep, *into the adjacent shallow bay, which at that time approached near to the banks of the river*, and was, in general conditions, very much like other bays still to be seen on either side of the river and its passes, *entirely unobstructed by islands, and presenting a smooth sheet of water. The immense amount of sedimentary deposit carried in by the river, after the crevasse formed, led to an immediate and rapidly growing formation of land.* In May,

1875, this tract of land was threaded in various directions by open channels of sufficient depth and width for a large sternwheel steamboat to navigate, towing barges over one hundred and fifty feet in length. *A main channel, wide and of considerable depth, led from the river to the waters of the gulf, and subsidiary channels led from this main channel in many directions, and they were several miles in length, bordered on each of their banks by growth, mostly of willows.* The land and the channels above mentioned changed considerably during the five years required for building the South Pass Jetties. The entrance channel narrowed and its depth was greatly reduced. The main channel and all of the subsidiary channels above mentioned were considerably reduced in length (width, evidently), so that, where it was possible to navigate with the above mentioned boat and barges in 1875, it was not possible to do so in 1879 and 1880. A great deal of the land above mentioned was, during that time, subject to overflow during the river floods, and a deposition of sediment continued raising them more and more out of the water.

"The lands through which the said Jump and its branches run and the said Jump and its branches themselves have changed very materially within my recollection.

"In the line of my professional work I have had occasion to carefully study the physical conditions of the lower Mississippi river and the result has been that the conditions above described at the Jump prevail elsewhere where the river breaks through the narrow banks which separate it from the waters of the bay on either side. At a point about three miles above the head of the pass, called Cubitt's Gap, the river similarly broke through. This occurred not long before the jetties were begun in 1875. At that time it was a broad expanse of water in the adjacent bay, without any sign whatever of land appearing above the surface. This crevasse was about a half mile in width and from 60 to 80 feet in depth. The immense amount of sedimentary matter discharged into the shallow bay raised a considerable portion of the submerged land above the water surface before 1880, on which the reeds, grasses and willows began to grow. The delta formation which took place at the Jump took place here. Several channels led in various directions and between them the land rose above the surface.

"In 1888, from my own observation, the land had greatly extended

in area and in height above the surface, and the vegetation upon it had also greatly increased. Following the general law of such crevasses, this process of land-making will continue rapidly until a great area, like that at the Jump, will have been formed. The ultimate and not very distant result of the conditions existing at not only these two places, but at others, is the almost entire closing of the outlet. The principal reason for this closing up of crevasses and outlets is that the river water can not flow to any great distance from the river over the shallow bays, on account of the great frictional resistance which the submerged lands present to the flow of the water. This frictional resistance retards the velocity of the current, and the water, charged or loaded to its full capacity when it enters the crevasse, is not able physically to carry its burden, and drops it upon these submerged lands, and thus rapidly raises them to the surface of the ordinary level of the gulf. There are many points which I have observed in the passes of the Mississippi and along the river near them, where crevasses took place many years ago, but by the process above described have been entirely closed up and nothing is left but a 'scar,' as it were, to show where a cut had been made in the banks of the river at some time long past. It is an accepted axiom among the hydraulic engineers of the Mississippi that 'the river heals its own wounds.'"

The evidence discloses this witness to have been one of the engineers of Captain James B. Eads, and, as such, gave superintendence to the construction of the jetties in 1875, and subsequent years—a few years after the Packard entry of the land in controversy. It further shows that he subsequently wrote and published a work entitled the History of the Mississippi Jetties, from which the record furnishes several extracts, and we quote the following, viz.:

"About forty-five years ago the river broke through its west bank, twelve miles above the head of the passes, at a narrow fisherman's canal that led up to it from the gulf. In a short time a torrent eighteen hundred feet wide and sixty feet deep swept through this crevasse. For a long time the river at flood poured through it with great velocity, and spread its muddy waters far and wide over the shallow bay. The same principles that produced the delta at the mouth of the river formed one here. After the lapse of years there appeared well-marked channels, three or four feet deeper than the adjoining shoals, which gradually rose to the surface by the deposits

of successive overflows. These shoals confined the currents still more to the channels, and increased their depth. The seeds of grasses, flags and reeds that came down with the river found a lodgment on the half-submerged banks, and soon covered them with a rank vegetation. This growth caught the sediment carried into it by the overflowing waters and built up the banks still higher, on which sprang up a dense growth of willows, crowding out the weaker vegetation and taking possession of the whole district. A richer and more conveniently arranged harvest field for the jetties than this great tract of willows could not have been found. This crevasse is generally known as the 'Jump.' The passes of the Jump were sufficiently wide and deep to admit a good-sized steamboat, and they ramified this sub-delta in every direction."

Taking the testimony of this witness as our guide, and we think it but fair that we should do so, it appears evident that the alluvial deposits he describes gave greatest elevation to the lands in question during the series of years *immediately succeeding 1836*, the year during which the crevasse occurred, and consequently there must have been a large area of land raised above inundation, as well as tidal overflow, at date patent issued to Packard in 1869—more than thirty years subsequently.

The precise condition of things existing at date of issuing patent, is not clearly ascertainable from the evidence, but it is quite apparent that such elevated area *must have extended much beyond the limits of the tract it conveyed* to Packard, taking the surveyed lots on the river front as the initial point of calculation.

And presumably the register of the land office was aware of the status of the sea marsh in this locality, and issued his warrant of location as well as the patent conformably thereto.

Accepting this as the true situation of the land conveyed by the patent, it is quite manifest that it did not constitute a riparious estate, in the sense of the civil law, to which the described accretions attached.

In the recent and conspicuous case of Delachaise vs. Maginnis, 44 An. 1043, this question passed under critical review and analysis, and this court, through Mr. Justice Fenner, as its organ, said:

"The principle underlying and determining the title to alluvion in our system is the equitable one expressed in the maxim *Qui sentit onus sentire debit et commodum*. As Portalis, in his 'Exposé des

Motifs' of the Code Napoleon, quaintly says: 'There exists, so to speak, an aleatory contract between the riparious owner and nature, whose action may at any moment despoil or increase his estate, in which sense it may be said that rivers give or take away like chance or fortune.' If it takes away, the owner must bear the loss; if it gives, justice accords him the gain.

"Another principle is that the title to alluvion is a purely accessory right, *attaching exclusively to riparian proprietorship*, and incapable of existing without it. This is implied in the very name given to the right as a right of *accession;* and the chapter of the code under which the provisions relative to alluvion are found is headed thus: 'Of the Right of Accession to What Unites or Incorporates Itself to the *Thing*.' As strongly stated by this court in the leading case on the subject, *riparian ownership* is 'of the *essence* of the right of alluvion; the alluvion is but the *accessory;* the *front* tract is the *principal;* the *former can not exist without the latter*.'" Municipality vs. Cotton Press, 18 La. 219; *vide* Ruch vs. City, 43 An. 275.

But the principle has been incorporated into our code in the following words, viz.:

"The accretions which are formed successively and imperceptibly to any soil situated on the shore of a river or other stream are called alluvion.

"The alluvion belongs to the owner of the soil *situated on the edge of the water*, whether it be a river or stream, and whether the same be navigable or not," etc. R. C. C. 509.

Counsel quotes from the early case of Stephenson vs. Goff, 10 R. 99, as favoring the theory of the defendants, but we do not so consider it.

It says: "Where it is shown that the boundary lines of the land claimed by one holding under a confirmation by the United States, *and a survey made by a government surveyor, were run as near as possible to a bar*, the whole of which was subject to be overflowed at high water, and the greater part of it to an annual overflow, so as to include all the high land susceptible of ownership, the proprietor will be entitled to all the alluvion or batture subsequently formed on the site of the bar."

But we are of the opinion that a proper construction of the foregoing quotation confirms our view.

See also Ferriere vs. City, 35 An. 209.

On the law and the evidence our conclusion is clear, to the effect that the defendants are not entitled to the alluvion that has been formed in the rear of the sea marsh their vendor acquired from the State.

During the progress of the trial the defendants set up, as an estoppel against the demands of the State, the proceedings and decision of the register of the land office, in 1889, wherein he recognized the title of the defendants under the Packard patent, and canceled certain entries of other parties of portions thereof, as being in conflict therewith—acting under the authority conferred by the provisions of Act 104 of 1888.

We do not think this a serious plea, because the law referred to has no application to this class of cases.

The act, in terms, confers upon the register authority, under the circumstances and conditions named, to cancel "dual or double entries," which have been made "by conflicting claimants" to the same identical land. But the lawmaker was so cautious as to place a limitation upon the power conferred, and only authorized him to "cancel the last entry made, provided such entry was made through error, mistake or otherwise; and provided further, that the first or former entry is held to be valid." Sec. 1, Act 104 of 1888.

The following is the text of the register's decision, viz.:

"BATON ROUGE, April 24, 1889.

"This matter, having been submitted by *R. M. White*, upon the evidence filed by him, and the defendant, Bayley, having been notified by letter of said White's application *for cancellation of his patents*, and the said letter having been returned in due course of mail *as uncalled for*, and the evidence being in favor of said White's application, under and by virtue of Act No. 104 of 1888, I do hereby *cancel patents* Nos. 2050 and 3072, issued to said G. W. R. Bayley, agent, respectively, on the 27th April, 1875, and 12th day of June, 1875. This 24th day of April, 1889.

JOHN S. LANIER, *Register*.

Now it appears that the defendants trace title to the lands in controversy through the identical *R. M. White*, upon whose application the patents of Bayley, supposed to be in conflict with his own, were canceled. It also appears that the decision was based *solely* and ex-

clusively upon the evidence he filed, and that the contestee was never notified of said proceedings at all. And neither he nor his assignors are parties to this suit.

Such a proceeding was virtually *ex parte* and possesses not a single ingredient of *contestatio litis*, the determination of which forms either *res judicata* or estoppel against the State; and she is not concluded thereby.

After a careful investigation of this case we have reached the deliberate conclusion that the judgment appealed from is correct.

Judgment affirmed.

Mr. Justice Parlange takes no part.

Rehearing refused.

No. 11,377.

46 679
49 1623

46 679
50 1371

46 679
125 1005

L. J. LUCKY ET AL. VS. POLICE JURY OF BIENVILLE PARISH ET AL.

1. Act No. 106 of 1892, entitled "An act to provide for contesting elections held under Articles 209, 242 and 250 of the Constitution of 1879, and the laws to carry the same into effect," is not unconstitutional as violative of Articles 29 and 30 of that instrument.

2. The Police Jury of Bienville parish was properly made a party defendant in the contest of an election held under Act No. 88 of 1892, by citation upon its president.

3. Where the court, from all the circumstances in a particular case and from all the evidence in the record, can reach a conclusion as to what the actual legal vote cast at a particular precinct was, it is its duty to give effect to the vote, notwithstanding the election officers may have been guilty of misconduct in some particular respects. The rejection of the entire returns and the entire vote at a poll for misconduct by the election officials is not by way of penalty or punishment upon the commissioners, or the particular persons or interests to be benefited by the illegal action, but only because in the special case the truth is not deducible from the returns and the evidence. The political rights of the legal voters must be saved if it be possible to do so.

4. Where parties contesting an election place one of the commissioners upon the stand, and through him prove a particular illegal act by the commissioners, which is susceptible of separation from their general conduct and susceptible of special correction, and the same commissioner affirmatively proves (if his testimony is to be taken as trustworthy) that the fact shown was the only one of which complaint could be made, and that otherwise the votes cast were legally cast, and the returns made otherwise correctly showed the vote as cast, the court should limit the remedy to throwing out the votes shown to have been illegally cast and returned. Whether or not the commissioner under such circumstances is to be believed will depend upon all the facts and circumstances of the case and the whole evidence in the record. He is not necessarily

to be disbelieved. Plaintiffs, in placing him upon the stand as their witness, show confidence themselves in his truthfulness. It is very questionable whether the official acts of election commissioners should be permitted to be impeached by the testimony of the commissioners themselves.

APPEAL from the Second District Court, Parish of Bienville. *Watkins, J.*

Ben. P. Edwards, W. M. Richardson, Wise & Herndon and *Jno. A. Richardson* Attorneys for Plaintiffs and Appellants:

A vote may be illegal, because the person casting it may not be qualified to vote at the election, or because it is given at the wrong place, or the wrong time, by a qualified elector, or because it is cast without a compliance with the requisite preliminaries, or because given in an improper manner. Am. and Eng. Encyclopedia, Vol. 6, p. 351 *et seq.*

Fraud on the part of the commissioners of election destroys the presumption of the correctness of the returns, and destroys their value as evidence. Fraud does not invalidate the legal votes cast, but, by destroying the presumption of the correctness of the returns, it makes it necessary that any person who claims any benefit from the votes shall prove them; and where no proof is offered, and the frauds are of such a character that the correct vote can not be determined, the returns of the precinct will be rejected. Am. and Eng. Encyclopedia, Vol. 6, p. 353 *et seq.;* McCreary on Elections, Secs. 472, 488, 391; citing also Knox vs. Blair, 2 Cong. El. Cases, 526; Mann vs. Cassidy, 1 Brews. (Pa.) 11; Morey vs. Spencer, 4 Cong. El. Cases, 447; Washburn vs. Voorhies, 3 Cong. El. Cases, 54; Vallandigham vs. Campbell, 2 Cong. El. Cases, 223.

J. C. Egan, L. K. Watkins, F. P. Stubbs, J. A. Dorman, Drew & Stewart and *J. E. Reynolds* Attorneys for Defendants and Appellees:

The theory of plaintiffs is that the minority should prevail. The true rule in all republican governments is, that the will of the people as expressed at the ballot box should be ascertained and carried into effect, if possible, from any evidence within the reach of the court.

In the absence of statutory authorization, courts are without jurisdiction *ratione materiæ* to entertain cases of contested election. "No statute invests the courts of this State with jurisdiction over contested elections to determine the parish seat." 41 An. 846, State *ex rel.* Woodruff *et al.* vs. Police Jury *et al.* Affirmed in the subsequent decisions relating to contest over Bossier court house and parish seat.

Act No. 106 of 1892 is not the required "specific statutory authorization," giving right of contest in this case if the act is unconstitutional, and its unconstitutionality is urged on the grounds—(*a*) More than one object is embraced in the act. (*b*) Its objects are not expressed in its title. (*c*) It seeks to enact laws by reference only. Arts. 29 and 30 of Constitution of 1879; 44 An. 90.

"No officer of a police jury can legally stand in judgment for the corporation without special authorization." Quoting 38 An. 630, Police Jury of Ouachita vs. City Council of Monroe, and page 704 *Id.*; 33 An. 58. As a canvassing board, under Acts 88 and 106 of 1892, the whole body must be sued.

A voter must have the qualifications required in Article 185 of Constitution and be registered. Art. 186, Acts 1876, extra session, No. 58, p. 94; Acts No. 123 of 1880, No. 101 of 1882. See Tullos vs. Lane, 45 An. 333.

The returns of the officers holding the election are *prima facie* correct, and he who attacks same for irregularity or fraud carries the burden of proof.

Irregularities in holding an election do not make it a void election, and the courts, where possible, will correct the returns so as to show the true result. 32 An. 861, Duson vs. Thompson; 29 An. 610, Weber vs. Wilton; McCrary on Elections, Secs. 483, 539. No election shall be vitiated on account of the negligence, illegal or improper act or conduct of any officer, or other person, unless it be proved in a contest that a sufficient number of electors were thereby deprived of their votes to have changed the result of the election. Act No. 58, extra session of Legislature of 1878, Sec. 85, p. 96.

If fraud is clearly shown on the commissioners it only makes their return worthless as evidence. Contestants in such cases have

the right to prove by other evidence the true vote cast in the election. Same authorities as above, and see McCrary, Secs. 424, 486.

In such cases evidence sufficient to satisfy the courts of the result is sufficient; no form of proof is required.

The authorities in reference to the prorating of votes (McCrary, Secs. 460, 461) do not apply in this contest, as the plaintiffs have judicially admitted the returns are correct, excepting at the Arcadia and Taylor precincts; and have made the further allegation of their own vote being correct at the other precincts, which can not now be swelled by the court in prorating. Hence unregistered and illegal votes shown by defendant at the precincts in the parish should be taken wholly from the side of the plaintiffs under this judicial admission.

The opinion of the court was delivered by

NICHOLLS, C. J. The controversy in this case arose from an election held on the 17th of January, 1893, under the provisions of Act No. 88 of 1892, for the location of a new parish seat for Bienville parish—the towns contesting for the location being Arcadia and Bienville.

Plaintiffs are voters and tax-payers of the parish, living at and near the town of Bienville; the defendants are the police jury of the parish, cited through its president, and the town of Arcadia, cited through its mayor.

On the 19th of January, 1893, the president of the police jury issued a proclamation declaring that Arcadia had, by a majority of sixty-five votes, been selected as the parish seat, and recognizing and announcing that fact.

Plaintiffs contest the election and pray for a judgment decreeing the town of Bienville to have received a majority of the legal votes, decreeing it to be the seat of the parish, and ordering the judicial records, which had in the meantime been taken to Arcadia, to be removed to Bienville.

They recognize that eighteen hundred and sixty-four (1864) legal votes were cast at that election. They contend that of these Arcadia only received six hundred and six (606), whilst Bienville received twelve hundred and fifty-eight (1258), a large majority.

In their petition they furnish a list of the different polling places and of the votes cast at the same in favor of each of the towns, according to their theory of the rights of parties. In so doing, they exclude entirely the votes cast for Arcadia, as shown by the returns from the Arcadia precinct, in Ward One, and at Taylor, in Ward Three; but they retain the votes for Bienville, as shown by the same returns.

The Arcadia precinct returns showed a vote of *six hundred and fifty* for Arcadia, and *three* for Bienville; those of Taylor, *sixty-seven* (67) for Arcadia and *twelve* (12) for Bienville.

They allege that frauds were practised in favor of Arcadia at the Arcadia and Taylor precincts by the commissioners of election or with their connivance to such an extent that the results at those precincts can not be ascertained. That the commissioners thereat made false and fraudulent returns of said election, and that false and fraudulent ballots in favor of Arcadia were deposited in the ballot boxes at those precincts by the commissioners or with their connivance and consent, all of which were counted and returned as legal votes in favor of Arcadia; that for these reasons the ballots and returns at those precincts should be rejected and disregarded, but if they should not be entirely rejected then petitioners alleged that at least two hundred persons were permitted to and did vote at Arcadia at said election who were ineligible on account of some being non-residents—some minors, others not being registered, and others not being present to cast their votes; and at the Taylor precinct there were at least twenty-five ballots put into the box for persons not present to cast their votes, a sufficient number to change the result, and the commissioners who received said votes acted wrongfully and fraudulently, well knowing they were not legal votes, and had they been rejected the result would have been in favor of Bienville. That said illegal ballots were wrongfully and fraudulently counted and returned for Arcadia. They further allege that Bienville received a large majority, at least six hundred and forty-four of the legal voters cast at the election and is the choice of the electors of the parish, and should be so adjudged.

That acting alone on the face of the returns made by the commissioners of election to the police jury (which returns included the false, fraudulent and illegal ballots returned from Arcadia and Taylor precincts), the president of the police jury issued and caused

to be published a proclamation declaring that the parish seat of Bienville parish was removed from Sparta to Arcadia.

That this proclamation was issued and published without authority of law, but that none the less the clerk and sheriff had obeyed the proclamation and had removed the records and property of the parish to Arcadia, and that the town of Arcadia claimed to be the parish seat under the said election—a claim unfounded in law and equity.

The president of the police jury filed exceptions to the petition to the effect: (1) That Act No. 106 of 1892, providing for contests of election of this character, requires the police jury to be the defendant, and service to be made on the police jury or other body or authority holding the election; that the police jury is a political corporation created under the laws of the State and can only act in the mode prescribed by law, and that he as president of the body did not represent it and could not stand in judgment for it without special authority, which had not been given him in this case; (2) that the suit should be dismissed for the reason that there is no defendant in the case, the statute declaring that it should be brought against the police jury.

In the event these exceptions should be overruled, he then excepted that it would be impossible to answer the petition under its general and indefinite allegations; that it charged fraud on the commissioners of two boxes, but did not state which of them had done so nor the act which constituted the fraud; that it charged that there were illegal votes cast at the Arcadia and Taylor precincts, but did not give their names. That the petition should have given the names of every person claimed to have illegally voted, and a statement of the facts which made them so. That without specifications of names and of facts, and a statement of the nature of the fraud perpetrated by each commissioner and voter, the issues could not be fairly and properly tried.]

He prayed for the dismissal of the suit on the exceptions.

The mayor of Arcadia excepted that the court was without jurisdiction *ratione materiæ* to try the case for the reason that *Act No. 106 of 1892*, under authority of which it was instituted, was unconstitutional and void.

1. Because more than one object is embraced in the act.
2. Its objects are not expressed in its title.

3. It seeks to enact laws by reference only.

The court ordered the plaintiffs to amend their pleadings "so as to state explicitly the acts of fraud, etc., complained of, and to make such other allegations not exclusive of or in conflict with their original allegations as might be necessary to authorize the introduction of their evidence, and make them as full as it is claimed is required by McCrary on Elections, pp. 264 and 265, sections 400 and 402 inclusive, and overruled the other exceptions.

In the amended petition which plaintiffs filed under this action of the court they charged that three commissioners at the Arcadia precinct (naming them) illegally and fraudulently put into the ballot box at that precinct, at that time, or permitted the same to be done with their connivance and consent, more ballots or tickets than there were names on the check list of persons named as voting to the number of at least fifty-two. That they allowed persons to vote who were not registered and legally entitled to do so, or who were minors or who were non-residents, to the extentof six hundred and fifty votes; that the list of the persons allowed to vote as above alleged is shown by the certified list of names of the persons claimed to have voted annexed to their supplemental petition. That at the Taylor box, the three commissioners (naming them), after the polls had been opened and the election proceeded with for one hour, permitted one A. J. Colbert to go inside of the room with said commissioners, and to participate in and control and manage the said election, and that the said commissioners and Colbert did put into the box sixty-seven ballots for persons who were not present to cast their votes, the list of the persons thus put into the box being shown by the certified list of names annexed.

Defendants filed an original and subsequently an amended answer. After pleading the general issue defendants attack the commissioners at the precincts of Driskell, Gibbsland, Bulah, Bienville, Sparta, Lanhorn, Ringgold, Prothro, Castor, Liberty Hill and Friendship, and many of the votes cast at these precincts, alleging fraud on the part of the commissioners, and minority, absence, want of registration, etc., on the part of the voters, also naming certain votes as having been cast for Arcadia and not counted, also alleging that no tally was kept at Union Church and Lanham, and that a certain colored club of twenty-two members had been bribed to vote for Bienville.

The town of Arcadia, through its mayor, excepted that it had been improperly made a party, and prayed that the suit as to it be dismissed.

The District Court rendered a judgment in favor of the defendants, rejecting plaintiffs' demand and dismissing the suit at their costs They have appealed.

We are of the opinion that the exceptions taken asking the dismissal of the suit for the reason that "there is no defendant in the case, as the statutes have declared that such a suit should be brought against the police jury, and it had not been so brought, as the president of the police jury upon whom service was made had no authority to represent the police jury without special authority to that effect, which authority he had not been given in this case," was correctly overruled.

The suit brought is not to mandamus the police jury or its members to do some act, but to annul and undo what it has declared and pronounced well done under the powers granted it in the matter of the special election held. Under the law the suit had to be brought against the police jury—which body is called into court as a defendant through citation upon the president. The authority to represent the police jury when sued in this class of cases is to be found in the State law, and is not dependent upon action to be taken by the body itself.

The exception taken to the jurisdiction of the District Court on the ground that Act No. 106 is unconstitutional is not well founded.

The title of the act is "An act to provide for contesting elections held under Arts. 209, 242 and 250 of the Constitution of 1879, and the laws to carry the same into effect."

The act in question was enacted by reason of the decisions of this court holding that the judiciary was without power to pass upon contests raised in regard to elections held under the articles of the Constitution mentioned in the absence of special legislation granting authority so to do. Its object was to provide for such contests through suits and to establish a uniform rule governing them all. The body of the act fairly conforms to the title, and the title discloses sufficiently fully its scope and purpose. The fact that several different kinds of special elections may fall under the operation of the statute does not break the unity or singleness of its object.

The district judge in referring to the third branch of this excep-

tion, which was to the effect that the passage of the statute was an attempt to enact laws by reference to the title of other laws, correctly states that "when Art. 30 of the Constitution provided that no law shall be revised or amended by reference to its title it was no doubt intended to be restricted to the revisal and amendment of laws already passed, and not to be extended to the passage of original laws making operative those articles of the Constitution which were not self-operating."

The judgment of the District Court evidences great labor, patience and industry. Annexed to it, as part of it, are original memoranda of the judge, contained in sixty-four pages, showing which of the voters were rejected and which not, and giving, in the first column, the registration numbers; in the second column, the names of the voters arranged in alphabetical order; *in the third column*, the pages of the evidence in respect to each; in *the fourth column*, the names of the witnesses; in the fifth, the substance of the evidence, and in the sixth, remarks.

The correctness of the conclusions of the judge in respect to the individual voters does not seem to be questioned, the contest really turning upon those reached by him in respect to the actions of the commissioners at the Arcadia and Taylor boxes. Plaintiffs contend and maintain that the entire vote at both of these precincts should be thrown out by reason of fraud on the part of the officials at the boxes.

Relative to the Taylor box, the judgment makes the following statements: "The first witness introduced (by the plaintiffs) was Thomas Crow, one of the commissioners at the box. His evidence shows that four persons whom the commissioners considered to be qualified voters at the Taylor precinct had failed to come to the election, and just before the polls closed the commissioners put four ballots in the box for these four absentees. He and two other commissioners swear that they intended no fraud, but knew how the absentees wanted to vote and put their ballots in for them, as was customary at primary elections. Of course these ballots (being for Eugene Clayton, Bill Speck, Charlie Grimes and Davis Richardson) are not legal—they were cast and counted for Arcadia and will have to be deducted from Arcadia's vote. The real serious question to be determined is, shall the entire box be thrown out? Each of the witnesses—Messrs. Crow, Colbert and Nelson—are so well and favorably

known by the court, their standing is so high in the community as honorable men, that I should be loath to impute fraud to them. But the plaintiffs have placed Mr. Crow upon the witness stand, and thus vouch for his truthfulness. He says he intended no fraud, and the evidence shows that there was no effort at concealment. While their act was illegal and wrong, the other voters, who are shown by the witnesses to be legal voters, voting at that box, should not be deprived of their votes by casting out the entire box. All the votes cast at Taylor, except those four, are fully proven to be legal, and are counted."

The Arcadia box is thus referred to: "It is sought to be thrown out on account of the frauds claimed to have been committed by the commissioners. Without specific allegations, they were permitted, under the legal rules laid down by the courts in the trial of contested election cases, to introduce proof to show that one of the commissioners stuffed the ballot box—that persons were allowed to vote who lived in Union, Lincoln, Claiborne and Natchitoches parishes; that one at Minden, one at Gibbsland, and others at other places, voted by proxy; that men were allowed to vote more than once; that dead men voted, and that fifty-two more ballots were in the ballot box at the close of the election than there were names on the list of those voting. Having thrown the doors wide open, all the evidence went in."

The judgment then proceeds, after an analysis of the testimony given in respect to each of the matters charged, to sustain some of the contests made, to dismiss others and to explain various matters which are attacked as suspicious and fraudulent, and declares: "This makes a total of thirty-nine votes cast out at the Arcadia box, which, with four cast out at Taylor, makes a total of forty-two votes for Arcadia to be taken from the sixty-five majority received, and leaves twenty-three majority for Arcadia, not taking into consideration the eleven illegal, unregistered votes cast at Driskell, six at Gibbsland, one at Bulah, six at Sparta, thirteen at Lanhorn, ten at Ringgold, five at Prothro and three at Liberty Hill, at all of which places the larger proportion of the vote should be deducted from Bienville, except at Ringgold. There were several illegal votes shown to have been cast for Bienville besides those above, which are designated on the memorandum as not registered, but it is useless to enumerate them, for if the Arcadia box is to be discarded the result will be in

favor of Bienville, and if the Arcadia box is to be counted Arcadia will have the majority, whether the contention as to Union Church and Gibbsland be sustained or not.

"There is only a difference of two votes claimed to be shown between the vote as cast and as retnrned at Union, and I can not decide sufficient fraud to throw that box out. The indications are very strong that the club of twenty-two at Gibbsland were bribed (so charged to be by defendants), but the evidence is not sufficiently strong. The same might be said as to the ballot box stuffing at Arcadia. All the commissioners deny it; but if it were true, the legal voters ought not to be deprived of their votes on this account. The fifty-two votes complained of were all thrown out. No one was prejudiced by them. It does not make any difference how they got in the box. Being in the middle or at the bottom of the box, it does not seem plausible that they were put in there late in the day. The over-zealous voters must have slipped them in there with their ballots folded separately."

Plaintiffs rest their attack upon the integrity of the Taylor box precinct returns upon the testimony of Thomas Crow, one of the commissioners at the box whom they placed upon the stand and examined as witness over the objections of the defendants, that, as a public officer, who had made an official report, he could not be permitted as a witness to impeach it. From this witness was elicited the fact mentioned in the judgment of the District Court, that four tickets had been improperly and illegally placed in the ballot box and counted by the commissioners.

The plaintiffs maintain in this court, as they did in the lower court, that the consequence of this act was to necessarily carry with it the rejection of the RETURN *in toto* and the *rejection* of the ENTIRE VOTE at the precinct. It has undoubtedly been held in many cases where the managers of an election have been clearly shown to have committed a fraud in the conduct of the election, or the counting of votes, and the returns clearly shown to be wilfully and corruptly false in any material part, that the whole of it becomes worthless as proof, and the entire poll must be rejected. McCrary on Elections, Secs. 184, 185 and 302, cites authorities to that effect, but the same author, in Section 368, says: "To set aside the returns of an election is one thing, to set aside the election itself is another and very different thing. The return from a given precinct being set aside,

the duty still remains to let the election stand, and to ascertain from other evidence the true state of the vote. The return is only to be set aside, as we have seen, when it is so tainted with fraud or with the misconduct of the election officers that the truth can not be deduced from it. The ELECTION is only to be set aside when it is impossible from *any evidence* within reach to ascertain the true result—when neither from the returns nor from other proof, nor from all together, can the truth be determined. It is important to keep this distinction in mind. * * * The question under what circumstances the entire poll of an election district may be rejected has been much discussed, and conflicting views have been expressed by the courts.

"The power to reject an entire poll is certainly a dangerous power, and though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested election case, it should be exercised only in an extreme case—that is to say, a case where it is impossible to ascertain with reasonable certainty the true vote. It must appear that the conduct of the election officers has been such as to destroy the integrity of their returns and to avoid the *prima facie* character which they ought to bear as evidence before they can be set aside as evidence and other proof demanded of the true state of the vote (Sec. 303). "Undoubtedly the general rule is that if legal votes have been cast in good faith by honest electors it is the duty of the court or tribunal trying a contest to ascertain their number and give them due effect, notwithstanding misconduct or even fraud on the part of the election officers. Such fraud or misconduct may destroy the value of the officer's certificate, and may subject him to severe punishment, but the innocent voter should not suffer on that account if by any means his rights can be upheld (Sec. 304). The general rule is that the ordinary rules of evidence apply as well to election contests as to other cases (Sec. 306)."

The difficulty in matters of election contests is not so much in the principles governing them as in the application of these principles to particular cases.

In the one before us an unwarranted, illegal act on the part of the commissioners at the Taylor precinct has unquestionably been established—established, however, by the commissioners themselves as witnesses upon the stand. But whilst the special fact referred to is brought out through the commissioners, these same commissioners

establish affirmatively that in all other respects the election was fairly conducted, and that the returns evidence correctly the legal vote at the poll. We have reached on this subject the same conclusion which the district judge did. The rejection of the entire returns of a poll, and of the entire vote cast thereat, by reason of the misconduct of the commissioners, is not by way of punishment of the commissioners or of the particular persons or interests to be benefited thereby, but because the court has reached the conclusion that the truth can not be deducible from the returns, and the will of the voters can not be ascertained. If the court reaches the conclusion that the actual vote can be ascertained, it is its duty to give effect to it and save the innocent voters from the loss of their political right to be heard.

Plaintiffs contend that it is absolutely inconsistent in the court to give any weight whatever to the testimony of commissioners who have been shown to have been guilty officially of an illegal act; and where it has thrown out votes by reason of such illegal act, but in this they are mistaken. Whether or not the commissioners are to be believed under oath as witnesses when some particular act done by them is clearly illegal and their return, by reason of this act, is attacked and thrown under suspicion will be dependent upon the entire circumstances of the case and the whole evidence in the record. The commissioners in this case acted utterly unjustifiably in drawing a distinction between a special election held for a particular purpose and a general election held for selection of officers, in assimilating such an election to a party primary election and in following at the poll the practice at that poll of depositing votes for absent legal voters whose views were known and whose manner of voting, if present, had been ascertained. Such a practice is reprehensible at a primary, even if sanctioned by consent, and totally inadmissible in an official election held under the law.

In Thompson vs. Ewing, 1 Brewst. 107 (McCrary, Sec. 303), it was said "that the whole conduct of election officers may, though actual fraud be not apparent, amount to such gross and culpable negligence, such a disregard of their official duties, as to render their doings unintelligible or unworthy of credence, and their action entirely unreasonable for any purpose." But we do not find in this case, as a matter of fact, such a condition of things. We are satisfied that the only wrongful act done was the depositing of the four votes men-

tioned, and that the district judge in his action correctly limited the remedy to throwing out those particular votes.

The precinct was a small country precinct, where doubtless every voter and the views of every voter were well known. The pleadings make a direct general attack upon the whole conduct of the election, and yet no attempt was made to sustain these sweeping allegations. The poll books, the tally sheets and the returns were all introduced in evidence.

The commissioners were placed upon the stand and proved up the exact vote, admitted freely and without hesitation what they had done, explained how and why they had done it, and, as we have said, showed affirmatively that the particular act was the only one which could be complained of. We do not think that they imagined that these four votes would have the effect of altering the general result of the election and we do not think that intentionally and wilfully they committed a fraud. The district judge knows the parties and thinks them incapable of it, and the plaintiffs themselves in placing Mr. Crow upon the stand show they had confidence in his veracity. On the whole we think the popular will at the Taylor precinct has found expression through the action taken in the District Court.

The conclusion we have reached in the case, on the assumption that the testimony of the commissioners was legally taken, renders it unnecessary to pass directly upon the important question raised by the defendants' bill of exceptions as to the right of the plaintiffs to impeach the returns through the testimony of the commissioners themselves. The rule has been in this State to require official misconduct, which has been alleged as the basis for the setting aside of official action, returned and certified to, to be established by parties other than the officers themselves. The decisions on the subject refer principally to sheriffs, notaries, and to members of the jury.

We know of none and have been referred to none touching this particular class of officers. We know of no reason which would go to the exclusion of notaries, sheriffs and jurymen for the purpose stated which would not be equally applicable to commissioners of election, and do not see any good ground for making an exception as to them. Such is our present view of the matter, but we prefer to leave it as an open question.

So far as the Arcadia returns are concerned, we adopt the con-

clusions of the district judge. The attack upon the integrity of one of the commissioners at the box at that precinct is utterly unsustained. It rests practically upon the testimony of one witness, whose testimony is negatived by that of a number of persons who were directly on the spot, and who affirmatively swear to the non-existence of the facts stated by this single witness. The commissioner himself, under oath, positively denies the facts sworn to; the other commissioners and the clerk of election (against the propriety of whose conduct in the particular matter there is not a scintilla of evidence) sustain the testimony of the commissioner who is charged with misconduct. Brown, who is claimed to have lent himself to the perpetration of the fraud by masking the ballot box temporarily from the view of outsiders, emphatically denies having done so, or of hearing any such words spoken by the commissioner as the witness mentioned states that he used.

His testimony on that point is supported by all the parties who were inside the voting room. It is strange had the commissioner made use of the language attributed to him that only one person should have heard it, and still stranger that the language itself should have been so openly used. The failure of the witness to at once complain of the act which was afterward set up as a ground for a rejection of the returns, and his keeping silence as long as he did, are circumstances which we have had also to consider. In addition to the number of witnesses arrayed against the charge made—witnesses whose credibility has not been impeached—the plaintiffs are met by the presumption which the law itself attaches in favor of the correctness and honesty of official acts. We do not see how, under the testimony as well as under this presumption, it was possible for the district judge to reach any other conclusion than he did on this particular point.

We have spoken of the charge as being sustained by the testimony of only one witness; we mean by that to say that we attach no weight to the testimony of Bullard. His testimony, in the first place, differs materially from that of the person whose testimony he seeks to corroborate. His character for veracity was attacked, and though supported by several witnesses, the fact is before us, in addition to other facts, that this witness voted illegally himself at the Arcadia precinct, upon an affidavit which we find in the record. There were a number of illegal votes cast at the Arcadia box; the district judge

has thrown them out. We have no reason to suppose the commissioners to be chargeable with the casting or the counting of those votes.

There were fifty-two more ballots found in the box when the count was made than there were names of persons voting. These ballots resulted from the folding of several tickets together, and the depositing of them in that way in the ballot box. They were not in one particular place, but scattered throughout the box. They were at once rejected on being discovered, and not attempted to be counted. The explanation given of the presence of these ballots in the box is that the tickets were printed on thin paper, and were in bundles of some thickness, the tickets adhering more or less to each other, and that occasionally some voter not noticing the fact would take off two or more, fold them and deposit them in the box as their vote. Two witnesses were produced who stated that they had themselves only accidentally discovered just before voting that the folded ticket which they were about to deposit contained not one, but several tickets. The attention of one of these witnesses was drawn to the fact by the commissioner whose integrity is impugned.

There was no objection made to the presence of others than the commissioners at the count. Two persons were present who were there specially for the purpose of seeing that it was fairly made and in the interest of Bienville. The votes were taken out and announced by Dr. Baker, in whose integrity both sides seem to have had and still have confidence. It could scarcely have been contemplated that a fraud could be successfully perpetrated through folded double ballots when an open count through disinterested parties was to be made. The fraud was bound to be discovered and bound to avail nothing.

The record in this case is one containing between one and two thousand pages; the testimony as to particular facts and as to particular persons is necessarily scattered. We have bestowed upon it our best attention, and we feel satisfied that the judgment must stand. We do not think it necessary to enter more minutely than we have done into the details of testimony relative to the charge of stuffing the ballot box at Arcadia. There are reasons other than that which we have mentioned which influence us in reaching our conclusions; but these, in our opinion, were sufficient. For the reasons herein stated it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

Succession of Gaines.

No. 11,367.

46 695
49 1739

SUCCESSION OF MYRA CLARK GAINES.

Costs follow the judgment, and therefore it is not necessary for parties to whom costs are due to appeal.

When the court orders costs to be taxed against a defendant the plaintiff has not such an interest in the matter as to be entitled to notice of the granting of the order. If the party to whom the costs are due appeals from the order it is not necessary to make plaintiff a party thereto.

An attorney at law is presumed to know what transpires in the litigation in which he is employed so far as it affects his interest. If he permits his associate to claim docket and deposition fees in the Federal courts and an order in his favor is rendered for the same, the party owing the fee will be protected in paying according to the terms of the order.

APPEAL from the Civil District Court, Parish of Orleans.
King, J.

Farrar, Jonas & Kruttschnitt Attorneys for Executor and Executrix of W. R. Mills, Appellants:

This case is entirely one of fact. The claim of the executor and executrix of last will of Mills is based upon the proposition that Mrs. Gaines collected for his account, and for his use and benefit, the sum of three thousand five hundred dollars, which had been decreed to him as costs in the suits of Gaines vs. Agnelly and Gaines vs. Monseaux.

This claim is correct as a matter of fact; the lower court so decreed by its judgment.

Through some misapprehension that judgment failed to decree payment of interest, and that is the sole complaint which this appellant has to make against it and it is now asked that it be amended, in so far as to decree, that the amount of two thousand nine hundred and fifty-twe dollars and ten cents, adjudged in favor of the executors of William Reed Mills, bears interest at five per cent. per annum, from the 10th of January, 1881, until paid, instead of from July 1, 1892, until paid, and that appellants recover costs of both courts.

Richard De Gray and *Brown & Choate* Attorneys for Appellees:

This being a suit or claim based on an alleged judgment of another court, two defences can be made. First, did the court have

jurisdiction, and did the defendant have notice or appear. Christmas vs. Russel, 5 Wallace, 290; Thompson vs. Whitman, 18 Wall. 457.

When a party has, or claims to have, an interest in a claim, and stands by and sees the same rejected, and takes no appeal, and and in no manner complains of said rejection, the judgment is final as to him, and the reversal of said judgment in the appellate court on an appeal taken by another party does not inure to the benefit of the party who does not appeal.

The opinion of the court was delivered by

McENERY, J. This is an opposition to the account filed in the succession of Mrs. Myra Clark Gaines, and this part of the opposition relates only to an amount claimed as costs due the succession of the opponent, W. R. Mills.

W. R. Mills, deceased, was an attorney at law, and resided in the city of New Orleans. He had been employed by Mrs. Gaines to prosecute certain suits in her litigation with the city of New Orleans. In these suits Mrs. Gaines collected costs to the amount of thirty-four thousand dollars, in which were included the costs due the opponent. The amount of costs due to said Mills was ascertained and fixed in the following order rendered by the United States Circuit Court for Louisiana: "The exception of W. R. Mills, filed on 22d May, 1878, to the report of J. W. Gurley, master, herein filed on the 20th May, 1878, is sustained, and it is ordered that said opponent W. R. Mills, be, and he, as solicitor of complainant, entitled to the docket fee to be taxed as costs as against each defendant, wherein reference is made to a master to determine the question of fruits and revenues.

"It is admitted that in the cases called the Agnelly and Monseaux cases, that Mr. J. Q. A. Fellows was associated as counsel with Mr. Mills in recovering the judgments in these cases; that is to say, the law firm of Fellows & Mills, composed of said Fellows and said Mills, were the solicitors in said cases."

The validity of this alleged judgment as against Mrs. Gaines or her succession is denied, and among others on the following grounds:

1. Because the proof fails to show she had any notice of the proceedings which culminated in said alleged judgment, or that she ever voluntarily appeared therein, and because the same is not final, but contemplated future action which is not shown to have been had.

2. Because the proof shows said fees were the property of the law firm of Fellows & Mills, composed of J. Q. A. Fellows and said W. R. Mills, and that said alleged judgment was rendered without any notice to said Fellows, or any appearance by him in the proceedings in which it was rendered, and there is no proof that the alleged future taxation was ever had.

We presume the Federal court in granting the order to tax costs followed the practice in said courts, and that there was no law requiring notice to be served on the complainant, or on the solicitor who was associated in the case.

We see no reason why Mrs. Gaines should have been made a party to the proceeding, or that she should have been served with notice of the same. She was without interest in the mattor, and she was equally without interest to inquire whether the taxed costs were due Mills, or Fellows & Mills. It was immaterial to her to whom the costs were to be paid. In fact she was in no way interested in the order, and it matters not whether it was final or not, so far as she was concerned. She could not have collected the costs, except in pursuance of this order. She assumed the right to collect the costs, amounting to two thousand nine hundred and fifty-two dollars and ten cents, and having collected the same under an order of court, recognizing W. R. Mills as the owner, she was bound to account to him for the amount so collected. Fellows, the associate of Mills, is asserting no claim to the costs, and in the absence of any process of any court, arresting the amount in her hands—now in the succession—the succession will be protected under the order in paying the amount to the succession of Mills. In argument it was contended that Fellows, if a payment was made to Mills' succession, might thereafter claim his part of the costs from the succession of Gaines. This position is untenable. Fellows was an attorney of record, associated in the cases, and he must be presumed to have had knowledge of what transpired in the litigation in which he was employed. He permitted his associate and law partner to claim the costs and procure an order in his favor for the amount. After payment of the amount to Mills, Fellows would be estopped from claiming any part of the costs from the succession of Gaines.

The succession of Gaines goes further than denying the right of the succession of Mills to recover the costs, and claims the whole amount as the property of the Gaines succession.

The following is an extract from the brief filed on behalf of said succession:

"But there is another objection that goes to the whole of this claim, and will appear from the following:

"Among the other things in evidence is the above 'Transcript of Record, Supreme Court of the United States, City of New Orleans vs. Myra Clark Gaines,' 7 Vols. From pages 1101 and 1102, Vol. 1 of said transcript, it appears Mrs. Gaines, on the 5th day of May, 1893, recovered a judgment in the United States Circuit Court for the Eastern District of Louisiana against said city of New Orleans for one million nine hundred and twenty-five thousand six hundred and sixty-seven dollars and eighty-three cents, with interest, and said sum of thirty-four thousand dollars, amount of costs taxed against various defendants in the Agnelly and Monseaux cases, and the suit in which this judgment was rendered was brought by Wm. Reed Mills as the solicitor of Mrs. Gaines, Vol. 1, pages 1 to 13.

"From this judgment an appeal was taken by the city of New Orleans to the United States Supreme Court (page 1102), where said judgment was reversed, and the amount was reduced to five hundred and seventy-six thousand seven hundred and seven dollars and ninety-two cents, with interest, with permission to the city of New Orleans to show what credits, if any, were to be allowed on said amount, and the cause was remanded for that purpose. See 131 U. S. Reports, page 191 (in evidence herein), and especially page 220. When the case came back to the Circuit Court the above amount of five hundred and seventy-six thousand seven hundred and seven dollars and ninety-two cents was reduced to the extent of fifteen thousand three hundred and ninety-four dollars and fifty cents, and said claim for thirty-four thousand dollars costs (in which it is claimed were Mills' said docket and deposition fees), in said Agnelly and Monseaux cases, was rejected. Both parties appealed—the city because more deductions were not allowed her, and the Gaines succession because said deductions of fifteen thousand three hundred and ninety-four dollars and fifty cents had been made, and because said thirty-four thousand dollars costs had been disallowed and rejected. These were the only parties to that appeal—the only ones that ever complained thereof, but Mills, although it is claimed he was interested to the extent of his alleged docket and deposition fees, and was, as solicitor, a party to the cause, never complained or

joined in that appeal, notwithstanding the pretence that he was interested as above. Surely it was his right and duty to have complained and joined in that appeal from the Circuit Court, but not having done so, but, on the contrary, having acquiesced therein, his claim for docket and deposition fees is ended, for the reversal of the judgment of the lower court did not inure to his benefit, but to the sole benefit of the appellant—the succession of Mrs. Gaines. See 138 U. S. Reports, pp. 615 and 616, also in evidence.

"Nor is this by any means a case where the succession has collected a claim or judgment as the property of William Reed Mills. When the above judgment and costs were awarded against the city of New Orleans and in favor of Mrs. Gaines, and were collected by her succession, they were awarded and collected, not as the property, in whole or in part, of W. R. Mills, but as the property of Mrs. Gaines. In other words they were not collected under the *ex parte*, interlocutory order order of the Circuit Court made on the exceptions of Mills, but under the judgment of the United States Supreme Court rendered in her favor and reported in said 138 U. S. Reports. There is, therefore, nothing in the collection of said thirty-four thousand dollars costs which would estop the appellee from denying any interest or ownership on the part of Mills therein."

Costs follow the judgment, and we can see no reason why Mills should have appealed from the decree, which made it necessary for complainant to appeal from the entire judgment. The costs followed as a necessary incident to the judgment.

There is nothing in the case reported (130 U. S. Reports, p. 595) that sustains the pretences of the succession of Gaines.

In that suit the costs were taxed in favor of the complainant, as in all cases where the judgment is against the party cast.

The decree in the case referred to relating to the costs is "that the decree of the court herein should be modified by adding to it the amount of said costs, to-wit: thirty-four thousand dollars, with interest, as adjudged in the original decree of said court."

The decree appealed from must therefore be annulled, allowing interest on the amount of costs, two thousand nine hundred and sixty-two dollars and ten cents, from the tenth of January, 1881, until paid.

As thus amended it is affirmed, the succession of Gaines to pay costs of appeal.

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46 700
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46 700
105 214
46 700
113 381

No. 11,391.

STATE OF LOUISIANA VS. JOHN L. SARRADAT, LOUIS KUNTZ ET ALS.

City Ordinance 4155, C. S., is constitutional, legal and valid.

The City Council of New Orleans has the unquestioned authority to designate a place where perishable food may be sold, such as meats, fish, fruits, vegetables, etc.; to regulate the police of the market places, to lease the same, not for the purposes of revenue solely, but in order to maintain the market buildings and the police of the same. And for this purpose to authorize the lessee to charge a reasonable sum for stalls and space.

Because one raises his own produce gives him no right to sell it in violation of a city ordinance.

The city ordinance regulating the markets must give free access to the markets and afford proper facilities to persons who desire to sell goods which the ordinance requires to be exposed for sale there. The ordinance must be impartial, making no discriminations and creating no monopolies, and offering no serious impediments to trade.

APPEAL from the Second Recorder's Court of the City of New Orleans. *Aucoin, J.*

E. A. O'Sullivan, City Attorney, *Geo. W. Flynn*, Assistant City Attorney, for Plaintiff and Appellee:

The city asks no tax, but simply, under the powers granted it by the Legislature, in order to maintain, not a monopoly, but to maintain public markets, has provided that neither fish, meat nor vegetables shall be sold within prescribed limits.

Sambola & Ducros Attorneys for Defendants and Appellants:

Evidence tending to show the alleged unconstitutionality or illegality of any fine or penalty imposed by a municipal corporation must be admitted by the police magistrate. Const. 81.

Amended Sec. 22 of the Market Ordinance of this city is not applicable to gardeners. R. S. 2670.

The facts proved below are not at all the acts prohibited by Sec. 27 thereof, which does not apply thereto.

The powers of a municipal corporation are strictly construed; possesses only such powers as are delegated specially or by necessary implication. Cooley, pp. 192, 193; 38 An. 3, 4; Act 20 of 1882, Sec. 7, p. 20.

A municipal ordinance must be reasonable and not oppressive or vexatious, nor must it be in restraint of trade or contrary to common right. Boone, Secs. 292, 296; Cooley, 200, 202, 203; 39 An. 138, 139.

The opinion of the court was delivered by

McEnery, J. The defendants were convicted and fined for violating Secs. 22, 26 and 27 of City Ordinance 4155, C. S., amended by Ordinance 4274, C. C. They appealed, alleging the unconstitutionality and illegality of the ordinance. In detail the defence is that the provisions of said ordinance are oppressive, and contrary to the enlightened policy of the State, and "inasmuch as Sec. 27 aforesaid prohibits the sale of their vegetables in any other part of the market or vicinity, and during more than half the business portion of the day—*i. e.*, between the hours of 7 o'clock A. M. and 2 o'clock P. M.—in violation of the 1st and 206th articles of the State Constitution;" that the said sections of the ordinance are arbitrary and in restraint of trade, and in contravention of common as well as private rights; that the provisions of Sec. 22, if they apply to defendants' calling, exclude them from the markets, in violation of their constitutional rights to sell produce; that the sale of defendants' vegetables is not a nuisance and injury to the public health; that the police force of the city and the market lessees are convinced of the illegality of the ordinance and have not hereto attempted to enforce it, and permit the sale of vegetables from gardeners' carts at the market on the payment of twenty-five cents per day.

Article 206 of the Constitution has no application to the case. Art. 1 has reference to the origin of government from the people, and defines the legitimate objects of government, its legitimate end being "to protect the citizens in the enjoyment of life, liberty and property." Its failure to protect the public health would be as great a violation of its "legitimate end" as to actively depart from its object by the enactment of a law infringing upon the rights of the individual.

We may assume, therefore, that the proper regulation of the markets is a sanitary measure, being for the purpose of promoting the public health, and a legitimate exercise of governmental power. In the exercise of this power the Legislature has conferred ample and

complete power on the city council to establish markets and to provide for the cleanliness and salubrity of the city. In carrying out this conferred power the city council has the power "to designate certain spots or places for the sale of certain articles of provisions; in doing so they facilitate the people in the purchase of provisions of first necessity by confining the sale of them to particular places and hours of the day, and they facilitate the inspection of provisions; and by the hire of stalls they raise money to defray the expenses of building market houses and pay the salaries of officers they appoint to prevent the sale of unsound provisions; and they have an undoubted right to prevent the violation of ordinances they may pass in establishing markets." Morano vs. Mayor *et als.*, 2 La. 217.

The doctrine enunciated in this case seems to be universal. Dillon on Corp., Sec. 313; Parker and Worthington, Public Health and Safety, par. 305; State vs. Gisch, 31 An. 544.

The right to establish public markets is accompanied by the right to prevent the establishment of private markets within certain prescribed limits. Parker and Worthington, Public Health and Safety, par. 307; State vs. Gisch, 31 An. 544; New Orleans vs. Stafford, 31 An. 417; State vs. Schmidt, 41 An. 27; State vs. Boothe, 41 An. 46; State vs. Natal, 42 An. 612; State vs. Defees, 44 An. 164.

And also to prohibit the peddling about the streets of the city of all perishable food articles.

The city council therefore has the unquestioned authority to designate a place where perishable articles of food, such as meat, fish, fruits and vegetables, may be sold, in the market limits; to regulate the police management of the market places, to lease the same, not for the purposes of revenue alone, but in order to maintain the proper police of the markets, the building of market houses and the repairs to the same. And for this purpose to authorize the lessee to charge a reasonable sum for stalls and market room. *Id.*, Sec. 217.

The establishment of market places is for public convenience as well as for the promotion of the cleanliness and health of the city. It is not a permit or license to sell particular articles there, and therefore no special license for selling at that particular place can be exacted. But this does not prohibit the payment for the use of stalls and market room or space, which is exacted for the purpose of keeping up the market places. The market places having for their double purpose the preservation of the public health and the general

convenience of the public, all persons who resort to them for the sale of such articles as are required to be sold there must have access to them; the market regulations must be impartial, affording the same rights to all, avoiding the creation of monopolies in one or several persons, and the prohibition of trade in any article, or an undue restraint of trade. Parker and Worthington, Public Health and Safety, par. 308; Dillon, Municipal Corp., Sec. 380; City of Jacksonville vs. Ludwith, 26 Florida, 163; State vs. Mahner, 43 An. 497.

Section 22 of the ordinance prohibits the peddling of meats, fish, game, fowl, vegetables and fruits in any of the public markets, or within six blocks of same.

Section 26 gives the right to market wagons to back up to the banquettes along the markets to deliver goods previously sold to occupants of stalls. It prohibits the owners of the wagons from selling their produce from said wagons between the hours of 7 A. M. and 2 P. M. No fees or dues can be collected from said wagons.

Section 27 prohibits the sale of any article on the sidewalk, on the public walks in front or in the rear or around any of the markets.

The offence of defendants was selling from their wagons while they were backed to the market banquette for the purpose of delivering goods previously sold to owners of stalls.

Under the terms of the law referred to above, we are unable to see wherein any of the rights of defendants were infringed. They were dealers in vegetables, which the ordinance required should be sold if in the market limits, within market hours. They were not excluded from the sale of their produce in the markets. They could have rented stalls or space and disposed of their goods within the market inclosure.

There was no monopoly created in favor of one or more persons by the prohibition of the sale of certain articles immediately on the banquettes and approaches to the markets. This regulation did not prevent their sale elsewhere, either in the market or beyond the market limits. The market ordinance is not oppressive, as it interferes with no right of the defendants. It is not partial and does not operate against them exclusively, but is applicable to the vendors of articles or goods required to be sold within certain limits and within certain hours.

The complaint about deficiency of room for the numerous carts or wagons at the market has nothing whatever to do with the case.

There is no prosecution for obstructing the approaches to the market by defendants' carts. The testimony which was rejected also has no place in determining the question at issue. It is immaterial whether the defendants for a long time were permitted by the market lessees and the police to sell from their wagons while backed to the market sidewalks, or that they were required to pay twenty-five cents for selling from their wagons. The ordinance does not require the payment of such a fee, and the evidence was irrelevant.

Because the defendants raised the produce which they sold in violation of the ordinance gave them no special privilege of exemption from its operations.

The case of State vs. Blazer, 36 An. 363, relied upon by defendants, presents a different state of facts and different issues were involved, and it therefore is inapplicable here.

Judgment affirmed.

No. 11,528.

STATE VS. PHILIP CLARK.

46 704
113 781

It is error for the trial judge, in a trial for murder, to refuse to charge the jury that they can, if the evidence justifies it, return a verdict of guilty of manslaughter.

46 704
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APPEAL from the Nineteenth Judicial District Court, Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, *R. F. Broussard*, District Attorney, for the State, Appellee:

There was nothing in the case at bar, under the statement of facts as given, upon which the court could have been called upon to charge upon the law of manslaughter, to make his failure to do so ground of reversible error. There was no evidence in the case tending to reduce the crime below the grade of murder. State vs. Jackson, 45 An. 975.

A. & Chas. Fontelieu Attorneys for Defendant and Appellant:

The refusal of the judge, in a trial for murder, to charge the jury that they may find a verdict of manslaughter, in accordance with Sec. 785, Revised Statutes of 1870, is a fatal error which will vitiate the verdict found against the accused and entitle him to a new trial. 40 An. 725; 41 An. 410.

The opinion of the court was delivered by

McENERY, J. The defendant was indicted for murder, tried, and a qualified verdict of guilty without capital punishment returned by the jury. He appealed.

Counsel for the accused requested the court to instruct the jury in a special charge that one of the verdicts they could return was "Guilty of manslaughter." This charge was refused by the judge, on the grounds that the evidence in the case was entirely circumstantial; that the line of defence adopted by the defendant was not in mitigation of the offence for any of the causes known to the law, which would have reduced the charge of murder to manslaughter.

Section 785 of the Revised Statutes says that "on trials for murder the jury may find the prisoner guilty of manslaughter." It matters not, therefore, what is the nature of the evidence or the line of defence adopted by the defendant—the law absolutely and without qualification gives the jury the right to return a verdict of manslaughter on a trial for murder. It was the duty of the judge to instruct and charge them that if the evidence justified such a verdict they could return it. The identical question presented in this case was passed upon by this court in case of State vs. Brown, 40 An. 725. And for the reasons assigned by the trial judge in the instant case, the trial judge in that refused to instruct the jury that they could return a verdict of manslaughter.

"The charge was refused by the judge, on the ground, substantially, that the ruling invoked by the defence was inapplicable to the state of facts developed during the trial, which admitted of no mitigated verdict, but called absolutely for a verdict of 'guilty,' or not guilty,' and that to have given the charge requested would have been simply the enunciation of an abstract legal proposition which had no bearing upon the case on trial." *Id.*

In commenting on the statement of the trial judge in the case referred to, we said "the law's command is that the jury must be informed by the court that on trial for murder the jury may find the prisoner guilty of manslaughter, and the omission or refusal to so inform them is a flagrant disobedience of the law and is a fatal error.

This case was remanded (41 An. 410), and on the second trial the same question was, without the probable intention of the judge, thrust upon the court, by the charge of the trial judge, in which he said:

"I refused to give the charge because it did not seem to me under the facts disclosed on that trial that the crime of manslaughter was involved in the case," and then proceeded to give the jury the ruling of the court on the first appeal. In milder but equally emphatic language in the opinion remanding the case we pointed out what we conceived to be the duty of the judge on the trial of criminal cases in charging and informing the jury. "The judge's duty is very plain; to give the law and leave the jury to determine whether it is applicable to the facts, free from any opinion of his own on the facts."

The language of Sec. 785 of the Revised Statutes, and the opinions of this court interpreting the same, are plain and unambiguous, leaving no room for construction or a departure from the text of the section or the opinions of the court. It is to be regretted that the trial judge should have placed a construction on the Section 785, in direct opposition to its obvious meaning, and contrary to the rulings of this court. Such a course has served no useful purpose, but has been the occasion of unnecessary delay in the final disposition of an important criminal case.

The judges of subordinate tribunals may not always concur in the rulings of the appellate court, but it is the jurisprudence of the State that they shall respect the rulings of the Supreme Tribunal, and obey the law as interpreted by it.

After the law in a particular case has been announced by the appellate court, the individual opinions of judges of inferior tribunals are of little consequence, except so far as they may be advanced in the obstructing of the course of justice.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered that this case be remanded to be proceeded with according to law.

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49 1648

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No. 11,506.

MRS. S. DURWARD ET ALS. VS. MRS. JENNIE JEWETT ET ALS.

Where the issues involved are as to the ownership of a certain fund, and the District Court renders a decree in favor of plaintiffs, from which a devolutive appeal is taken by defendants, and the court afterward orders the fund distributed among those to whom it was adjudged in their application, the fund being on deposit in the court and under its control, no suspensive appeal can be taken by defendants from the interlocutory order of distribution. Such an appeal would arrest the execution of the judgment originally rendered, which can only be done by defendants by a suspensive appeal from it.

Durward et als. vs. Jewett et als.

In such a case, no question of distribution of the fund among those to whom it was adjudged by the decree is presented. The judgment, not having been suspensively appealed from, must be executed.

APPEAL from the Civil District Court for the Parish of Orleans. *King, J.*

Morris Marks, L. DePoorter and *Albert Voorheis* for the motion:

This court is without jurisdiction *ratione materiæ;* the interest of all the appellants united amounts only to thirty-two dollars, as formally admitted by them.

It is true there are two thousand three hundred dollars deposited in the registry of the court; but there are one hundred and eighty members of the Branch Lodge, so that the appellants' respective interests are infinitesimal. They presume to *champion* the rights and interests of their co-members—*all of them appellees;* but the latter have never conferred on them such mandate. Succession Wellmeier, 34 An. 819.

There is another fatal objection. The main judgment is under *devolutive* appeal, and the rule taken to enforce that judgment was made absolute upon auditor's report. This interlocutory decree is not appealable. Murphy vs. Murphy, 45 An. 433; State vs. Judge, 45 An. 883.

Branch K. Miller contra.

The Supreme Court has jurisdiction where the fund to be distributed exceeds two thousand dollars, whatever may be the amount claimed. 34 An. 1140; 39 An. 583; 40 An. 135, 136; 43 An. 423, 424, 375.

The opinion of the court was delivered by

McENERY, J. The plaintiffs are members of the Branch No. 1148 of the order of the Iron Hall. This branch is located in New Orleans. Fearing that defendants would dispose of the property which they held in trust for said branch for the benefit of plaintiffs and other members of said branch, and that there was no one to whom they could turn over the property, and fearing the same would be removed beyond the limits of Louisiana, the plaintiffs sued out an injunction commanding defendants to retain possession of all of said property, money, mort-

gage notes, etc., and restraining them from disposing of the same; and they be ordered to deposit said money, etc., in court for benefit of plaintiffs and all members of said branch.

The defendants answered that the money subject to the suit constituted the reserve fund of twenty per cent. assessments loaned in all local branches of the parent body of the order; that said money is the property of the order, whose headquarters are at Indianapolis, Indiana, and that the New Orleans branch held said money in trust for the order, and that a demand had been made upon said branch for the same.

There was judgment ordering the defendants to deposit in court the property, money, etc., in controversy, reserving the rights of any and all parties claiming any title or interest in said fund or to said property. The injunction was perpetuated, from which judgment defendants took a devolutive appeal. The amount deposited in court was two thousand four hundred and seventy-seven dollars and thirty cents.

After this judgment was rendered on motion of plaintiffs, suggesting that a distribution of the fund should be made between the parties, members or former members of said Branch 1148, and that the funds could not be distributed without the appointment of an audtor, B. Dryfous was appointed to make a full and final settlement of the amount due to each and every member of said branch, to make a tableau of distribution, deducting costs and attorney's fees. A report was made by the auditor, and the plaintiffs filed a rule against defendants to show cause why the tableau and report filed by the auditor should not be homologated and approved. In answer to the rule, defendants set up want of authority for the appointment of an auditor *ex parte;* that the funds sought to be distributed did not belong to the members of said Branch 1148, but to the Supreme Sitting of the order, by which we understand the central authority of the order, and therefore could not be distributed as proposed.

The District Court rendered a judgment on the rule homologating the auditor's report, and ordered the fund distributed. From this judgment the defendants took a suspensive appeal.

The appellees move to dismiss the appeal on the grounds that the appellants' interest in the fund is less than two thousand dollars, and their entire interest amounts only to one hundred and forty-two

dollars and ninety cents; and that this order is an interlocutory one, carrying into execution on original judgment.

Act 81 of the Constitution conferring jurisdiction on the Supreme Court when an amount is to be distributed uses the language: * * * "the fund to be distributed, whatever may be the amount therein claimed." Whan vs. Irwin, 27 An. 708; State vs. Judge, 30 An. 229; Boutte vs. Ex., 30 An. 177; State ex rel. Paper Co. 45 An. 1418; Murphy vs. Murphy, 45 An. 483.

We are not required by the pleadings to make any distribution of the fund among those to whom by the decree of the lower court it was adjudged. The defence to the rule is identical with that in the original suit from which the interlocutory order sprung. There was no suspensive appeal taken from that judgment, and its execution can not be arrested by defendants. Code Practice, Art. 578.

The interlocutory order is in execution of this judgment. A suspensive appeal from this order in effect arrests its execution.

We have repeatedly held that no appeal will lie from an interlocutory order which carries into effect a judgment which has become final, or from which no suspensive appeal has been taken. If, in carrying into execution the decree of the lower court, the judge exceeds the bounds of his jurisdiction, or acts illegally, other convenient and practical modes are provided by which the wrong done can be remedied by this court.

The original judgment appealed from by devolutive appeal in case of same plaintiffs versus same defendants, No. 11,408, having been this day annulled and reversed, the interlocutory order distributing the proceeds falls with the judgment, and no distribution of the funds can therefore be made as ordered by the court.

The appeal is dismissed.

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46 709
47 423

No. 11,536.

STATE OF LOUISIANA VS. DUNCAN WILLIAMS.

The mere fact of going to the place where the accused lived and seeking an explanation from him does not in itself constitute such an act of hostility as would justify the taking of human life. In order to constitute the overt act or hostile demonstration that would justify the taking of human life there must be some demonstration made by deceased against accused as to impress upon the latter that he was in imminent danger of his life, or some great bodily harm.

In some instances the extent of the overt act which would induce the accused to act in his self-defence is measured by the character of the deceased for a violent, quarrelsome, dangerous and turbulent disposition, notorious in the community or known to the accused.

APPEAL from the Eighteenth District Court, Parish of Lafourche. *Caillouet, J.*

M. J. Cunningham, Attorney General, and *B. F. Winchester*, District Attorney, for the State, Appellee.

John S. Billieu for Defendant and Appellant.

The opinion of the court was delivered by

McENERY, J. The defendant was indicted for murder, tried, convicted and sentenced to death. He appealed.

He relies upon one bill of exception reserved to the ruling of the trial judge.

It is as follows: "The defendant offered to prove by a State witness the turbulent character of the deceased when it was stated by said witness that the deceased living on another place came and sought the accused—that the overt act was complete from that fact."

To this bill the court appended the following statement: "By the court—There was no evidence of any overt act or hostile demonstration by the deceased toward the accused. The deceased went to the plantation where the accused was and asked an explanation about something which deceased had said to his wife about what the deceased had told him (accused) about her. Deceased and accused had some discussion about the matter when a mutual friend interposed and advised them that the matter was too trifling to have any dispute about, whereupon the accused returned into the house, from which he had come, when deceased first called him out. The deceased continued to talk on the gallery of his house with the said mutual friend, and remarked that 'any man who repeated what another had told him about his wife is a son of a bitch.' The accused, who had walked out of the house and gone as far as the steps of the gallery, turned and asked the deceased, 'Do you call me a son of a bitch?' To which accused replied, 'Call you a son of a bitch?' Whereupon, without any movement or demonstration on the part of

deceased, the accused fired the fatal shot. Such was the state of the case as made out by the only eye-witness, at the time the accused offered to prove the turbulent character of the deceased."

The mere fact of going to where the accused lived by the deceased to seek an explanation from the accused did not in itself constitute such an overt act of hostility as would justify the slaying of the deceased. In order to constitute the overt act that would justify the taking of human life there must be some demonstration made by the deceased against the accused of such character as to impress upon him that he was in imminent danger of his life or some great bodily harm. In some instances, the extent of the overt act which would induce the accused to act in his self-defence is measured by the character of the deceased for a violent, quarrelsome, dangerous and turbulent disposition, notorious in the community, or known to the accused.

In the instant case there was no demonstration whatever, according to the trial judge's statement, of the deceased against the accused. Words of abuse alone are not demonstrations against the accused, but they may be important to show the character of the overt act. No overt act accompanied the offensive words addressed by the deceased to the accused.

The learned counsel for the accused urges that had the testimony as to the turbulent character of the deceased been admitted it would have had the effect of lessening the punishment. The jury had before them all the facts in the case, and without the overt act the turbulent disposition of the deceased could have no bearing upon the case. The accused seems to have acted from provocation, but not of such strength as to justify the taking of the life of the deceased.

It was within the province of the jury to return a qualified verdict. But as they did not do so we are powerless to afford the defendant relief.

Judgment affirmed.

No. 11,389.

GEORGE B. RICE VS. MRS. MARY E. RICE.

46 711
49 874

46 711
117 281

46 711
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The alleged promise of a mother to a son to lend him money is not supported by the consideration alleged to consist in the acknowledgment that he received certain advances from his father's succession, least of all, if the acknowledgment is charged by the son to have been untrue.

Under our law damages and not specific performance, at least in ordinary cases, is the relief for breach of a contract for the payment of money. C. C., Arts. 1927-1934; Story's Equity, Sec. 714.

APPEAL from the Civil District Court, Parish of Orleans.
Theard, J.

Dinkelspiel & Hart Attorneys for Plaintiff and Appellant:

The right to a specific performance of a contract rests in the option of the obligee. C. C. 1926, 1927.

An advantage stipulated for a third person is a sufficient consideration for a contract. 1 An. 280; C. C. of 1884; C. P. 35.

Henry P. Dart Attorney for Defendant and Appellee:

An action does not lie to enforce a specific performance of an agreement to lend money, or to make a gift.

An objection may be made to evidence that it is inadmissible, because it could not afford the relief asked if admitted, and if proving to its full extent the plaintiff's allegations.

The opinion of the court was delivered by

MILLER, J. This is an appeal by plaintiff from the judgment of the lower court dismissing the suit against the defendant, his mother.

The basis for the demand is supposed to be furnished by a paper executed by the plaintiff before a notary, acknowledging the receipt by plaintiff of three thousand five hundred dollars from the succession of his father, and the promise of the defendant, in consideration of that paper, to lend plaintiff twenty-five hundred dollars for two years without interest. The cause of action is, however, amplified by the allegations in the petition, that plaintiff's claim against his father's succession was disputed by the mother and his co-heirs; that to settle the dispute he was induced to acknowledge he had received three thousand five hundred dollars, when, in fact, but one thousand dollars had been received by him from the succession, and that he was "enticed" to make the false acknowledgment by the promise of his mother to lend him twenty-five hundred dollars. The relief demanded is a judgment against defendant for the amount

stipulated to be paid in the asserted contract, or the annulling of the entire acknowledgment. The defendant filed, among others, the exception of no cause of action. The appeal is by plaintiff from the lower court sustaining the exception.

The brief for plaintiff treats the suit as one for specific performance. The relief usually accorded for the breach of contract is damages. Specific performance is decreed only in exceptional cases. It is difficult to conceive of any injury arising from the breach of a contract to pay or lend money that can not be repaired by damages. Our code declares, when the object of the contract is anything but the payment of money the damages are the loss sustained, or profits of which the party has been deprived; and as to money obligations damages for delay in performance, are limited to interest. Again, the Code declares in ordinary cases the breach of the contract to do, entitles the party aggrieved only to damages, but where this would be inadequate compensation specific performance will be constrained, if performance is in the power of the party who has contracted the obligation. We think that if plaintiff had any cause of action he has no basis to demand specific performance of his supposed contract. C. C., Arts. 1934, 1935, 1927; 1 Story's Equity, p. 714, as to specific performance.

But beyond the question as to the relief to be awarded for the breach of the contract of loan, there is, in our opinion, no contract in this case. The supposed consideration is the plaintiff's acknowledgment of the advances made him by his father. That acknowledgment is manifestly, no basis whatever to support the asserted promise of his mother to lend him twenty-five hundred dollars. If there was any benefit or advantage of any kind accruing from that acknowledgment, that benefit or advantage was not derived by the mother. It might be his co-heirs could avail of the acknowledgment, but not his mother, whom he sues. If, as the plaintiff states in his petition, the acknowledgment is untrue, it is not easy to perceive it would serve any purpose. Our conclusion is there is no cause of action stated in plaintiff's petition, either in respect to the asserted contract or the demand for a decree annulling his acknowledgment. Civil Code, Arts. 1779, 1893.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed, with costs.

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No. 11,401.

A. L. JOHNSON VS. THE CITY OF NEW ORLEANS.

Holders of claims against the city of New Orleans by the laws and ordinances under which the claims were created, entitled to payment only, from and out of the funds appropriated to payment of such claims, are not entitled to an absolute judgment against the city. City Charter, Acts of 1882, Sec. 64, Session Acts, p. 85; Act No. 88 of 1879, Session Acts, p. 57. Nor to interest on such claims, at least, unless there are funds in the treasury applicable to payment of such claims. 39 An. 991; 42 An. pp. 3, 164.

APPEAL from the Civil District Court for the Parish of Orleans. *Ellis, J.*

Jno. Q. Flynn Attorney for Plaintiff and Appellant.

E. A. O'Sullivan, City Attorney, *L. O'Donnell*, Assistant City Attorney, for Defendant and Appellee.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues as the holder by transfer of certain claims against the city of New Orleans created under various ordinances appropriating the funds to be derived from taxes to various objects of municipal expenditure. The relief sought is an absolute judgment against the city, bearing interest. The answer of the city is the general issue. The judgment of the lower Court recognized the plaintiff as owner of the claims and denied the relief claimed in the petition. From that judgment plaintiff appeals.

The city of New Orleans is provided with a limited power of taxation. It is required at the beginning of the fiscal year to adopt a budget of the anticipated revenues and expenses of the coming year, and as the revenues are collected they are credited to the accounts conforming to the appropriations in the budget. The creditors of the city, *i. e.*, those who become creditors from the fact that the money is not on hand derived from the revenues to pay them when the debt is created, are apprised by the law and by the ordinances of the City that they are to be paid from and only, out of the revenues appropriated for the payment of the claims and necessarily there is to be no payment until there are revenues realized and placed to the credit of the account against which the claims are to be charged. In no

sense, is the holder of such claims a general creditor of the city. He is a creditor with the payment confined to a particular fund, when collected. Every ordinance produced in the case to fortify plaintiff's demand, announces that the appropriations to pay the claims on which he sues, are not payable until there is money in the city treasury derived from the collection of the public revenues to the credit of the appropriate fund, *i. e.*, that from which the creditor is entitled to be paid. Whatever the character of the obligation, whether warrant, certificate or claim, original or transferred, has impressed upon it this specific and limited right of payment, and subject to that limitation the plaintiff acquired the claims on which he sues. 1 Dillon on Mun. Corporations, *verbo* Municipal Warrants; 39 An. 981; 19 Wallace, 477.

It has occurred and perhaps, is the case now, that there is a large amount of unpaid claims against the City payable out of appropriations of past years. This is due to shortages in the collection of taxes and perhaps other causes. The plaintiff, doubtless, is the sufferer, with others, from the absence of funds in the treasury to pay him. Hence, his appeal to the Court to change the character of his debt, and give him an absolute judgment against the City with interest. It is manifest, he is entitled to no such relief.

Holders of claims against the city of the character of those held by plaintiff, payable as they are only when the funds applicable to their payment are in the treasury, are entitled to no interest, at least not unless there are such funds on hand. The question of interest can not be deemed open. 39 An. 981; 42 An. 3. We are not called on to determine whether there is any right of action on such claims unless there are funds to pay them; the appeal being by plaintiff only.

It is therefore adjudged and decreed that the judgment of the lower court be affirmed, with costs.

No. 11,380.

MARY ANN WITLOW VS. MRS. LOUISA SUAREZ.

An agreement of settlement or compromise of claims against a succession, pleaded and maintained as a bar against a suit on such claims, can not be afterward used as a defence against the suit on the agreement itself.

APPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

W. S. Benedict and *H. C. Cage* for Plaintiff and Appellee:

After pleading a compromise in bar of a suit one can not be permitted to repudiate the compromise because the suit was brought.

Qui sentit commodum, sentire debet et onus.

A. L. Tissot Attorney for Defendant and Appellant:

An agreement relating to certain lawsuits can not be repudiated and violated by its intended beneficiary, and thereafter recovered upon.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues to enforce an agreement by which defendant, universal legatee of Joseph Llula, agreed, as soon as the litigation then pending in the succession of the deceased was ended, to convey to plaintiff certain real estate. The defence was *res judicata*, based on the judgment in the suit between the same parties, decided by this court in 44 An. 61, an estoppel arising, the answer alleges, from plaintiff's repudiation of the agreement sued on, and the repudiation is charged to consist in plaintiff's institution of the suit reported in 44 An. On these exceptions the suit was tried, and defendant appeals from the judgment in favor of plaintiff.

It appears that the plaintiff asserted the right to one-half of the property left by Llula; that with the view of preventing litigation, and for other causes as we gather from defendant's brief, plaintiff and defendant entered into the agreement on which plaintiff sues, for the conveyance to plaintiff of certain property. It is stated in defendant's brief this was not an agreement but a compromise: whether one or the other is, in our view, immaterial. Subsequent to the agreement the plaintiff brought the suit for one-half the property of the succession of Llula. The agreement now sued on, was urged by defendant in the previous suit as an estoppel against plaintiff. The decision in 44 An. 61 maintained that estoppel. Plaintiff's present suit on the agreement is the sequel of her previous controversy.

The decision in the 44th An. determined that plaintiff had no right to one-half the property of Llula. But as to the agreement the de-

cisions upheld it as an estoppel of plaintiff's demand in that suit. The expression of the court in that decision, it is said in defendant's brief was *obiter*. But the agreement was part of the defence. It was therefore properly passed upon. If an estoppel in the previous case, it was because of the obligation of defendant to convey the property for which the plaintiff now sues. Therefore, the previous decision instead of forming *res judicata* against plaintiff supports her present demand.

As to the exception that plaintiff is estopped from now suing on the agreement because she repudiated it by bringing the previous suit, we think the decision in that suit in effect, secures her right under the agreement. The defendant affirmed the validity of the agreement, when she pleaded it in that suit. If valid to conclude plaintiff asserting a demand for half the property, it certainly ought to avail plaintiff to secure that which it stipulates she shall have. The defendant in our opinion, can not, after successfully using the agreement as a shield against the demand of a different character in the previous suit, now deny the plaintiff's right to the property stipulated to be conveyed to her by the agreement.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

No. 11,888.

GRAND LODGE OF LOUISIANA F. AND A. MASONS VS. CITY OF NEW ORLEANS.

The questions involved in this case were decided and the case was remanded in order to hear evidence as to the relative value of the property occupied by plaintiff to that leased and yielding a revenue.

The District Court has complied with the judgment and fixed the value of the property. The value is not disputed.

Though the previous decision remanding the case was final, the principles enunciated were re-examined.

Our conviction remains unchanged.

APPEAL from the Civil District Court, Parish of Orleans. *King, J.*

J. Q. A. Fellows and *Chas. F. Buck* Attorneys for Plaintiff and Appellant:

In a question of law not argued, the decision is not *stare decisis* as to another, not a party to the case decided.

If the Constitution of 1868 and the legislation thereunder did not repeal the special acts of exemption from taxation, of certain charitable institutions, Art. 207 of the Constitution of 1879, being less broad in its terms of non-exemption, did not repeal such special acts of exemption.

"Charitable institutions," strictly such, have always and everywhere been held in the highest favor, and acts in their favor are to be construed most liberally.

The revenues and income of all charitable institutions are not private or corporate profit or income, but constitute a fund for the relief of the poor of the community and State, and relieve the State and municipality to its full amount in its duty to the poor and indigent.

It is the duty of the State to provide for the wants of the indigent within its bounds, and the taking from the revenues of a charitable institution by the way of taxation is the diminishing of the ability of such institutions to relieve the poor, and adds the same amount to the burden of the State, with the additional cost of collection.

The Article 207 of the Constitution of 1879 absolutely exempts "all charitable institutions," and the clause at the end applies only to the property of colleges, schools, etc.

Chartered charitable institutions are agents of the State in carrying out the objects of their foundation, and are subject to the control of the courts in case of any misfeasance or breach of trust. These are only the trustees of the charitable funds placed under their administration and as agents of the State, and can not, strictly speaking, derive any private or corporate profit or income.

The exemption from taxation of "all charitable institutions" is universal and exclusive, as much so as places of religious worship or burial; the question of property does not become a question. Charitable institutions can have no property, except as a trust, in the interest of the State and as trustees of the State.

Donations made to charitable uses are in effect made to the State, the entire revenues of which are devoted by the donors to the purposes designated and to relieve the State from a burden which it is bound to bear, and the taking of a portion of the revenues of such donations, in the form of taxation or other-

wise, would be a diversion of the funds from their proper destination, and, if by the trustees of such fund, would constitute a breach of trust.

E. A. O'Sullivan, City Attorney, *L. O'Donnell*, Assistant City Attorney, for Defendant and Appellant:

This cause was presented to this Honorable Court in 1892, and appears in the 44 An., p. 659. The decision referred to covered all points presented to this court with the exception of one, and that was "what was the value of the property leased by the plaintiffs, and from which an income or profit enured to them?"

The judgment of the court is based on the evidence adduced—to which nothing contrary was offered by the plaintiffs; in fact, plaintiffs' own witnesses were the only witnesses examined—this evidence reads, that the city tax for the year 1888 should be on an assessment of twenty thousand dollars, for the year 1889 on an assessment of ten thousand dollars, and for the year 1890 on an assessment of sixty-two hundred dollars.

The opinion of the court was delivered by

BREAUX, J. This case received careful consideration, and the principles of exemption enunciated in the decision remanding the case to decide the relative value of the property occupied by the plaintiff to that leased (or not in use, of the Grand Lodge) received the court's endorsement after mature deliberation.

The case was remanded to carry out the purpose just stated.

The extent of the exemption is defined.

The court *a qua* has correctly interpreted our decree, and the appellant has no objection to urge against the amount allowed in the judgment appealed from, if the court's views regarding the exemption itself remain unchanged.

The plaintiff appeals from the judgment fixing the respective amounts and settling the value of the property upon which taxes are due, in order to reiterate defences heretofore decided.

On appeal a reconsideration is asked by appellant of the identical questions heretofore decided.

In the previous suits the plaintiff claimed that its exemption from taxes, under legislative grant, had the force of a legislative contract

which could not be repealed or impaired by subsequent constitutional provisions or statutory enactments.

On the part of defendant, it was pleaded, that the exemption claimed conferred a mere gratuity, subject to repeal, and that this exemption was repealed by Art. 207 of the State Constitution exempting property of charitable institutions, not used or leased for purposes of private or corporate profit or income, inasmuch as part of plaintiff's property is leased for corporate revenue.

These issues were argued orally and by brief.

The effect of the article of the Constitution (207) upon the exemption was the prominent issue.

This court's previous decision includes that point.

In answer to the proposition again argued, that charitable institutions, strictly speaking, can realize no private or corporate profit or income, we can only reiterate in different language that this court many years since established a difference in the matter of taxation between the property of a charitable institution yielding a revenue and that property which the institution occupies for the purposes of its charities. It was held that the former was subject to taxation, and that the latter was exempt from taxation. City of New Orleans vs. Congregation Dispersed of Judah, 15 An. 389.

A similar question was considered in the case of City of New Orleans vs. The New Orleans Mechanics Society, 27 An. 487. The court held that as a charitable society the property actually used by *itself* for purposes of charity would be exempt, but that the property not being used for the specific purpose expressed in the act of incorporation was not exempt from taxation.

The permissive article of the Constitution of 1868 to the Legislature to exempt property in the actual use of charitable institutions has received judicial interpretation, in a number of cases.

In two cases, however, 33 An. 850 and 37 An. 70, a different veiw was expressed, and the conclusions of the majority of the court were vigorously opposed. In one of these cases, the Poydras Asylum, Judge Fenner, in his dissenting opinion, says: "I think that, under the terms of the Constitution, and *under the jurisprudence of the courts established thereunder, the exempting statute was unquestionably repealed so far as inconsistent with the rule of taxation provided by Article 118.*" (Italics ours.)

The organ of the court, Chief Justice Bermudez, in the Poydras

Asylum case gave his concurrence to the principles enunciated in the case at bar.

Judge Manning was equally as emphatic in expressing his dissent in Orphan Asylum vs. Tax Collector, 37 An. 70.

As maintaining uniform interpretation upon the subject of repeal by Art. 118, he cited New Orleans vs. St. Patrick Hall, 28 An. 512, and others to the same effect.

The uniformity of interpretation was absolutely unbroken in 1879, and the limitation of exemption from taxation of property actually occupied by charitable institutions clearly announced.

In the face of the article of the Constitution (118 of 1868), and of the decisions limiting the exemptions as before stated, the article of the present Constitution was adopted containing the following: "Provided, the property so exempted be not used or leased for purposes of private or corporate profit or income."

This proviso is as broad and comprehensive as was the Article 118, of the Constitution of 1868.

The plaintiff in the case at bar seeks to reopen the question of the effect of the proviso of Art. 207 of the Constitution of 1879.

The repealing effect of the article was pleaded when the case was tried.

It was controverted from different points of view, and the repealing effect of the proviso was argued and reargued.

But waiving, *argumenti gratia*, the final disposition heretofore made of the case and reconsidering the proposition argued we do not discover that too great a scope was given to the proviso.

The property of charitable institutions leased and yielding a revenue had never been construed, prior to the Constitution of 1879, as part of the institution not subject to taxation.

It was property not free from taxation.

The present Constitution has not materially changed the exemption in this respect from what it was under the preceding Constitution.

Under both, charitable institutions have not, in themselves, elements of property as understood in commerce, unless they choose to invest in property and collect revenues.

Such property, when they choose to thus invest, is not exempt from taxation.

Counsel for the plaintiff argues that the proviso in question

can not, in the construction of the article, relate back to the word "property" in the third line before the word used.

As to public property and other property which can not be within the scope of the proviso, we think it sufficient answer to state that the proviso may apply to part of the property exempt in the body of the article, and that it may be that it can not in the nature of things be made a limitation in exempting other property.

Public property and its revenues are not subject to taxation, and therefore not within the intendment of the proviso.

The State for obvious reasons does not impose taxes upon her property and upon its revenues.

This property would be exempt without any law on the subject.

It does not follow that the other institutions referred to are not within the scope of the article when they own property yielding a revenue. *Utile per inutile non vitiatur.*

Questions of the great good accomplished by charitable and other similar institutions, however much they appeal to our sympathies, should have no weight in determining the meaning of an article of the Constitution.

A rigid adherence to the fundamental law recommends itself as highly proper in enforcing any of its provisions.

It is therefore ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed at appellants' costs.

No. 11,354.

C. S. BURT COMPANY VS. WIDOW B. LAPLACE.

The plaintiffs agreed with the defendant to furnish boilers and other machinery for the amount of seven thousand three hundred and thirty dollars.

The bagasse burner, part of the machinery, constituted nine hundred and seventy-five dollars of the amount.

If the bagasse burner, it was stipulated, did not prove of advantage to the defendant, the plaintiffs bound themselves to pay the grinding season's plantation fuel bill.

The plaintiffs claim the unpaid balance of two thirds of the whole amount, and contend that they have complied with the contract.

The defendant in her reconventional demand alleges that there was failure of compliance on the part of plaintiff. The evidence shows that the bagasse burner was the only defective portion of the machinery furnished.

She asks from the seller the one-third paid by her; to be relieved from the payment of any balance on the seven thousand three hundred and thirty dollars and that he be condemned to remove the machinery and pay her damages.

APPEAL from the Civil District Court, Parish of Orleans. *Rightor, J.*

Harry H. Hall Attorney for Plaintiffs and Appellants:

Plaintiffs agreed to furnish defendant with certain machinery for seven thousand three hundred and thirty dollars, of which amount nine hundred and seventy-five dollars was to be paid for a bagasse burner.

It was agreed in the contract that if it should be shown that the "bagasse burner did not properly consume bagasse so as to prove of advantage" to the purchaser, the seller would pay the plantation fuel bill for the season.

The seller sued for the unpaid two-thirds of entire purchase price, alleging his compl ance with all his obligations under the contract. The purchaser reconvened, alleging that the *bagasse burner* was defective, and asked that he be relieved from paying the balance of purchase price; that he recover from the seller the one-third of seven thousand three hundred and thirty dollars paid; that the seller be ordered to take back the machinery and burner, and that he be condemned to pay the penalty stipulated in the contract, to-wit: the plantation fuel bill for the season.

The evidence shows that all the machinery, except the bagasse burner, costing nine hundred and seventy-five dollars, gave complete satisfaction.

The judgment of the lower court *annulled and avoided* the contract, ordered the seller to refund the one-third of purchase price, seven thousand three hundred and thirty dollars, which had been paid to him, relieved the purchaser from paying the remaining two-thirds, and then *enforced the penalty of the annulled contract and condemned the seller to pay the purchaser's coal bill of seven hundred and fifty dollars.*

Nullity and rescission imply the total avoidance of the covenant for some inherent defect therein. The dissolution of a commutative contract for non-compliance is really carrying into effect a part of the convention, either express or implied. It excludes the idea of nullity or rescission. 11 An. 655, Rogron, Cap. 5, Sec. 7; Troplong, Vente, No. 689; 4 Marcadé, No. 570.

Hence there was error in annulling the contract; and yet, in enforcing the penalty, if there was violation of the obligation, the penalty could be enforced, but only by the maintenance of the contract and the payment of the stipulated price.

The record shows conclusively, moreover, as matter of fact, that the bagasse burner was not defective, but that it met all the requirements of the contract.

Chas. J. Theard Attorney for Defendant and Appellee:

The plaintiffs sold to defendant, and erected on her plantation, a complete plant or apparatus for the burning and utilizing of bagasse, including boilers, pump, burning outfit, and all other necessary machinery.

By the contract it was expressly stipulated that the burner should consume the bagasse from four hundred and fifty tons of cane daily, and with it make the full steam capacity of the boilers.

The contract price was seven thousand three hundred and thirty dollars, of which two thousand four hundred and forty-three dollars were paid by defendant to the plaintiffs before the machinery was erected.

The machinery proved to be very defective and entirely insufficient for the object for which it was intended.

The plaintiffs sue defendant for the balance due on the contract. She denies any indebtedness, and claims in reconvention the return of the money paid by her and the damages suffered by her.

There is nothing inconsistent in the demand that the contract be rescinded and that damages be allowed in addition where the contract has not been performed or has been defectively executed. And in such a case no putting *in mora* is required.

Lobdell vs. Parker, 3 La. 328; Morton vs. Pollard, 9 La. 174; Conery vs. Noyes, 17 An. 201, 203; Nicholson vs. Desobry, 14 An. 81; Goodloe vs. Rogers, 9 An. 273, and authorities there cited.

The fact that the contract itself stipulates what damages may be recovered does not affect the right to demand the rescission of the sale and damages in addition. It fixes the measure of damages; that is all.

Nor is the compulsory use of the defective machinery, during defendant's grinding season, a waiver of her claim for damages. Levi vs. Schwartz & Golding, 34 An. 209.

The opinion of the court was delivered by

BREAUX, J. The defendant having determined to change the sugar mill and engine, and to erect other evaporating pans for the purpose of economizing steam in her sugar house, resolved also to buy steam tubular boilers, drums, feeders, spouts and pumps, together with a Gordon Patent Hollow Blast Bagasse Burner.

She contracted with the plaintiffs to furnish part of these improvements.

The plaintiffs bound themselves to furnish the boilers to measure seventy-two inches in diameter and twenty feet long, and erect them on the plantation, and to furnish expert labor for that work—that is, to place them in position to put on the bricks. The defendant agreed to do the brickwork and furnish the material and labor to incase the boilers.

When delivered and ready for the brickwork the price of the four boilers and attachments was five thousand eight hundred and twenty-five dollars.

She also contracted for two batteries with three automatic feeders to feed and properly distribute bagasse for the price of five hundred and thirty dollars.

For the Gordon Bagasse Burner she was to pay nine hundred and seventy-five dollars.

The vendors, in order to fully impress upon the defendant the efficiency of the burner, agreed to pay all coal or other fuel for the crop, if the burner did not consume the bagasse, as agreed it should, and prove an advantage to the purchaser.

The guaranteed stipulation in the contract was limited to the bagasse burner.

The terms of payment of the total amount stipulated in the contract were: one-third upon delivery of the materials and apparatus at the plantation; one-third after the erection of the burner, and the remainder after the test and use, on the 5th of January, 1893.

The plaintiffs collected one-third of the amount.

The defendant having refused to pay the remainder, the plaintiff brought suit for the amount claimed as due.

The defendant interposed a general denial, save certain admissions substantially, that the plant sold by plaintiffs was sold for one price in three equal instalments, and that all the machinery sold was dependent upon the satisfactory working of the burner.

That the tests made proved that the plaintiffs failed to comply with the contract.

She avers that she is not bound to pay the amount stipulated in the contract and that she is entitled to demand the nullity of the contract.

In her reconventional demand she claims damages aggregating twenty thousand nine hundred and fifty dollars. The prayer of the answer is that plaintiffs' demand be rejected and that upon her reconventional demand there be judgment in her favor in one sum of two thousand four hundred and forty-three dollars, in another sum of ten thousand nine hundred and fifty dollars, and in a sum of ten thousand dollars, with legal interest on each.

The judgment of the District Court annuls the contract; orders the return to the defendant of the first instalment of two thousand four hundred and forty-three dollars paid by her and condemns plaintiff on the reconventional demand to pay the defendant six thou and seven hundred and fifty dollars damages, with interest. A *remittitur* for the interest was subsequently entered.

From this judgment the plaintiff appeals.

Though the Gordon Patent Hollow Blast Bagasse Burner proved satisfactory in a number of sugar houses and sugar mills, for causes not clearly demonstrated it is a failure in defendant's sugar house.

Witnesses testify as to the value of the apparatus as a bagasse burner in other localities.

The combustion is spoken of by these witnesses as being rapid, and that it makes sufficient steam. This, however, is not the case on defendant's place, where it only makes a black smoky fire and at times is clogged with bagasse.

The plaintiff was notified of the defect.

He and others connected with plaintiff's firm repaired to the place but it seems did not succeed in obtaining satisfactory results in the working of the burner.

Finally it was agreed to make a test of the apparatus on the 29th of December while the sugar house was in operation.

At the appointed time the interested parties and a number of witnesses were present and the test was made.

The contract contains the stipulation, requiring a burner to each battery with blast bars, intermediate bars, blower, piping gates complete to burn bagasse and with it to generate the full steam capacity

of the boilers, supplied with bagasse, at the rate of four hundred and fifty tons daily, or if less number of tons were supplied the steam pressure to be proportionately less.

The test was made in accordance with the conditions of the contract. No objection was urged to the method adopted for the experiment. It is proved that the bagasse was not different from the bagasse made by other mills.

The steam from other boilers than those sold by the plaintiffs was cut off and the burners fed with bagasse were the only steam-producing power.

The burners became clogged with bagasse and the steam pressure declined and most of the time the mill was stopped.

In seventeen and a half minutes' time the pressure was reduced from seventy-five pounds to about thirty-seven pounds.

There were planters present of experience, disinterested witnesses, who testified that the bagasse was poorly consumed; that there was but little heat in the burner and the operations were not those of an efficient burner. There were a number of machinists present who testified that it burnt the bagasse incompletely, and that it was altogether an absolutely defective burner.

The plaintiff testified that he made a test a short time preceding. It was the evaporation test on scientific principles.

It is not shown that this test was made contradictorily with the defendant or that any disinterested witnesses were called to witness the experiment. The result is that the correctness of that test is not sustained by the weight of the testimony.

There was no objection offered to the practical manner followed in testing the power of the steam produced, though it is not as accurate as the evaporation test, it is that generally followed in testing steam power; it proved for all practical purposes that the burner was not the burner plaintiffs agreed to furnish and deliver to the defendant.

If it was possible to show error it should have been established contradictorily, or in view of a number of witnesses sufficient to prove its correctness.

The contract shows that plaintiffs engaged themselves by the declaration "that coal or wood can be burned better than with the ordinary furnace if no bagasse is at hand, but in any event they guarantee to give more steam than any other furnace with the same amount of like fuel."

The experiments prove that this guarantee failed.

The unverified evaporation tests of plaintiff do not suggest that in any respect the burner was efficient and not a failure.

The reconventional demand is more particularly directed against the unsatisfactory and defective burner.

The proof shows that all the difficulties in operating the machinery were caused by the insufficiency of heat from the burner. It did not develop the capacity of the boilers.

It is not proved that the boilers are defective in material. The workmanship was not objectionable in any particular. They were of the quality and make required by the contract.

The defendant's contention on this point is that it is an entire contract and that a partial failure is equal to a total failure.

There was error doubtless, but the vendors acted in good faith. There is no fraud charged and the record does not disclose that they knew of the defect of the burner.

The defect of the burner caused a partial failure of consideration.

The fact remains that the defendant has received and used boilers that are not defective.

There was a partial performance, severable from the partial failure.

The dividing line between the two is clearly marked.

The failure is not in so material a point as to affect the entire contract.

These boilers were used during the grinding season without the discovery of any defect.

They have value, and all the qualities and power guaranteed in the contract.

They were sold for a special price. It is distinct from the price of the remainder of the machinery, though included in the same contract, and forming part of the total for the whole machinery.

The difference between these prices is great, and suggests that the defective part is not an essential.

The purchase price of the burner is of insignificant amount compared with that of the boilers.

The former, the boilers, are complete in themselves and are a consideration without reference to the burners. They are fit for the use intended. The defective apparatus does not in the least detract from their value. The particular burner is not essential to their use. The burner is an accessory.

Upon that subject Troplong (Vente 579) clearly says:

"With reference to the accessories of the thing sold they follow the principal. If a horse with saddle and bridle has been sold, in setting aside the sale of the former that of the latter follows.

But if the principal thing was not defective and the accessory was, the cause to set aside the sale is limited to the latter.

"*Mais si la chose principale etait saine et entiere, et* que le vice *rèdhibitoire tombà seulement sur l'accessoire, la rèdhibition aura lieu que pour l'accessoire seulement.*"

From Duranton (Vol. 16, Sec. 318) we quote: "*D'après ce principe* si je vous vends *mon domaine avec les six chevaux de labour qui y sont, je suis garantie des vices dont seraient infectés ces chevaux ou quelques uns d'entre eux, quand bien même la vente ne serait faite que pour un seule et même prix. Toutefois il n'y aurait pas lieu, dans ce cas, a l'action redhibitoire mais seulement a l'action quanti minoris ou en diminution du prix.*

Cette distinction est parfaitement établie dans la loi 33 des Aedil. edicto, et Pothier l'a adoptée dans son traite du contrat de vente.

From Laurent, Vol. 24, Sec. 292:

Il ne faudrait pas conclure de là que le contrat doit nécessairement être résolu pour le tout. Cela dépend de l'objet de la vente.

The question of partial consideration has been discussed in a number of decisions of the courts of this State.

It is announced as correct principle that the right to set aside the contract arises only when the things sold are dependent upon each other, so that the defect of one renders the other useless and without value.

It must appear that the interdependence was the principal motive of the contract. Hale vs. New Orleans, 13 An. 501; Mouton & Bro. vs. Whitely, 12 An. 175; Bertrand vs. Arcueil, 4 An. 430.

The following also applies:

"From this provision the inference is clear that if the several things sold together are independent of each other, and do not form a whole, and if the value of each thing is not increased by its union with the rest, a redhibitory action can be maintained only for those things which are found defective, and that the contract must stand and be carried into effect in relation to the others." Citing 6 Mart. 396; 3 N. S. 100; Pothier de la Vente, Nos. 226, 227, 228.

"The rule is that the redhibitory vice of one of several things sold applies to a limited class of cases." 3 An. 378.

We realize that the question is not free from difficulty.

Our determination in this case was reached after having considered that the boilers and attachments not defective remained and were used, though the defendant had other steam power within her control easily disconnected from the four boilers in question. No offer was ever made to return them and it does not appear that they ever gave cause for objection.

Moreover, though alleged in the body of plaintiff's petition, the prayer is silent in so far as relates to the boilers and their attachments.

The contract contains a stipulation guaranteeing the defendant from loss by defect of the burner.

In express terms, it was made the law of the contract. *Conventio facit legem.* The testimony on this branch of the case is not contradicted.

The number of barrels of coal and the price paid by defendant are proven.

The damages can not amount to less, under the evidence, than the amount allowed by the learned judge of the District Court.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended and that plaintiffs recover of the defendant the balance due on the apparatus (after deducting the price of the burner) and rejecting and striking from the judgment that portion ordering the return of the two thousand four hundred and forty-three dollars to the defendant by the plaintiffs (amount received on account).

It is further ordered, adjudged and decreed that upon the reconventional demand the judgment of the District Court be and the same is hereby affirmed and the defendant on that demand is allowed judgment against plaintiff for six thousand seven hundred and fifty dollars.

The amount of the original contract was seven thousand three hundred and thirty dollars.

From it is deducted the price of the burner and outfit	$975
Amount heretofore paid	2,443
	$3,912

with five per cent. interest *per annum* from October 25, 1892, on half of said amount, viz.: one thousand nine hundred and fifty-six dollars, and a similar rate of interest on a like amount from 5th Jan-

uary, 1893. The three thousand nine hundred and twelve dollars, plus interest as just stated, must be deducted from the six thousand seven hundred and fifty dollars; the remainder is the amount the plaintiffs are condemned to pay to the defendant.

It is further ordered, adjudged and decreed that plaintiffs are the owners of the bagasse burner and outfit covered by the sum of nine hundred and seventy-five dollars.

That the bagasse burner and outfit be delivered to the plaintiffs, and that they remove it at their expense.

It is further ordered that defendant pay costs of appeal.

Rehearing refused.

No. 11,407.

ARTHUR S. WHEELER VS. BOARD OF FIRE COMMISSIONERS ET AL.

46 731
51 292

46 731
115 590
115 597

46 731
119 883
120 635
e120 640

46 731
119 883
120 635
e120 640

1. The "veterinary surgeon" mentioned in Sec. 6 of the ordinance creating a paid fire department for the city of New Orleans is an officer of the department and holds his office during good behavior.
2. The Board of Commissioners was absolutely without power or authority to displace a veterinary surgeon who had been elected and qualified and was in the discharge of his duties as such by the election of another person, the officer having not resigned or been impeached. Such election was absolutely null, carrying with it no legal effects.
3. The officer attempted to be displaced through such an election by the board was authorized to ask and the court justified in granting an injunction in his favor restraining the newly elected surgeon, the Board of Commissioners and the chief of the department from interfering with him in the performance of his duties.

APPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

F. C. Zacharie for Plaintiff and Appellee:

A *de facto* officer is entitled to an injunction to prevent interference with him in the discharge of the duties of his office, by a rival claimant, until such time as the title *de jure* to the office shall have been judicially determined in a proper proceeding. High on Injunctions, Sec. 1315, 2d Ed.; 41 An. 333; 43 An. 83; the Callan case, 45 An., 673, does not contravene the principle; Callan was not a *de facto* officer.

"Two persons can not be *de facto* officers for the same office, at the same time." 15 Oregon, 456; 3 Am. St. Rep. 176; 19 Nev. 312; 8 Kan. 442; 10 Paige (N. Y.) 432; 22 Barb. (N. Y.) 80; 15 How. Pr. (N. Y.) 1470.

A *de facto* officer must be publicly and generally acknowledged and accepted as such; it requires general reputation as such to constitute the *de facto* quality and *status*. Am. and Eng. Enc. of Law, Vol. 19, p. 394; *Ib.*, Vol. 5, p. 92.

E. A. O'Sullivan, City Attorney, *Henry Renshaw*, Assistant City Attorney, and *Lawrence O'Donnell* for Defendant and Appellant:

Proceedings by injunction can not be used to determine disputed title to office. 41 An. 333; 43 An. 83; 45 An. 673.

Injunction will be denied when the acts to be enjoined have been committed, the purpose of an injunction, in the matter of the discharge of functions in a public position, being to prevent and not to correct wrongs. 45 An. 673.

Qui tacet consentire videtur.

The opinion of the court was delivered by

NICHOLLS, C. J. What is known as the fire department of the city of New Orleans owes its origin to the ordinance of the city of New Orleans which bears the number 5614.

The general control and administration of the affairs of the department is entrusted to a board designated as the "Board of Fire Commissioners of the City of New Orleans."

The powers, rights, duties and obligations of the board are set forth in the ordinance creating it.

Section 5 of the ordinance declares that the commissioners shall appoint all the officers and employés of the department, and Sec. 6 that the said board shall appoint as many assistant engineers, firemen * * * and other employés as may be requisite, *also one veterinary surgeon*. The 28th section of the ordinance is that upon which both parties to this litigation rely. It is as follows: "All officers and men of the department shall hold office during good behavior up to the age limits of sixty-five years, and shall only be deprived of office and position after impeachment and conviction by the commissioners."

The plaintiff herein was duly elected "veterinary surgeon" of the fire department on November 13, 1891, and qualified and entered upon the discharge of his duties as such. It is not pretended that he has resigned or been either removed or impeached. On the 12th of January, 1893, the Board of Commissioners elected John J. Morice to the position of veterinary surgeon. On the 14th of January, 1893, upon the petition of the plaintiff, an injunction issued enjoining and restraining the Board of Commissioners and Morice from any action interfering with or infringing on the plaintiff's rights of discharging the duties and receiving the emoluments of the said office until such time as the disputed right to said office should be judicially determined. Plaintiff in the petition upon which this injunction issued set forth his election and qualification as veterinary surgeon, his continued possession and incumbency of the office, the terms and tenure of the office and the powers and duties of the board. He also set forth the action of the board in attempting to replace him by the election of Morice, and declared this action illegal and unwarranted.

He averred that the Board of Fire Commissioners and Morice (the latter claiming title to the office by virtue of the election mentioned) and Thomas O'Connor, chief of the fire department, were seeking to impede, interfere and obstruct him in the discharge of the duties and functions of his office and receiving the emoluments thereof, and that he feared that Morice would seek and obtain recognition as veterinary surgeon unless all parties should be restrained by injunction. He prayed that an injunction issue, and after citation and hearing that it be ultimately perpetuated, restraining the Board, Morice and O'Connor from any action interfering with or infringing upon his right of discharging the duties and receiving the emoluments of the said office until such time as the disputed right to said office shall be judicially determined.

A motion to dissolve the injunction, as having been illegally issued (as the averments of the petition did not warrant it), and an exception dismissing the suit as disclosing no cause of action, were successively filed by the defendants and overruled by the court. They then answered, first pleading the general issue, and further answering averred that Morice was duly elected under the ordinance; that he had immediately thereafter entered upon the discharge of the duties of the office and was in the performance of the same at the date the injunction was taken out; that he was pre-

vented by the injunction from continuing to perform said duties, and that from the date of his election he had been and was still the sole and actual incumbent and *de jure* and *de facto* holder of the office. The District Court rendered judgment in favor of the plaintiff as prayed for by him, and defendants have appealed.

Only two questions are really before us:

1. Is the veterinary surgeon of the fire department of the city of New Orleans to be classed as one of the officers and men of the department?

2. If he is, did his displacement by the board in manner and form and under the circumstances as shown by the record authorize him to take and justify him in taking out the injunction which he did and when he did?

Defendants do not allude at all in their brief to the first point, and their contention in respect to it in argument was so clearly without foundation as to require no special or extended discussion. The veterinary surgeon is unquestionably an officer of the department. There is no basis whatever upon which to attempt to draw a distinction between him and the assistant engineers, the foremen and the other persons mentioned together in the sixth section.

The effect of our so holding is to bring the court at once to the consideration of the second question, for it is not claimed that the plaintiff has resigned, or been either removed or impeached, or that (assuming him to be an officer) the board had any power or authority to elect a person in his place.

The whole case of the defendants rests upon the incorrect premise that the plaintiff was connected with the defendant by a mere "*assignment to duty*" from which he could at any time be "*relieved*" by the board.

The board was absolutely without power or authority to so relieve him at will, he holding his office by a fixed tenure during good behavior, and as resulting from this fact its action in electing Dr. Morice in his place was an absolute nullity, carrying with it no legal effect whatever. It is claimed that the plaintiff was present when that action took place, that his name was placed in nomination as a candidate in opposition to Morice, that he made no protest, but acquiesced in the situation until his defeat. There is nothing going to show that plaintiff's name as a candidate was presented by his authorization. He was not called on to interfere with the pro-

ceedings of the board even had he been at liberty to have done so. He could safely rest on his legal rights.

The situation and position of no one was injuriously affected by his course. There is no estoppel in the premises.

The case of Callan vs. Board of Fire Commissioners, 45 An. 673, relied on by the defendant, bears no resemblance to the present. The plaintiff in that case did not pretend in his pleadings to have been at any time an elected officer; his utmost claim was that he was "acting" as an officer, which is something other and very different from "being" an officer.

Finding that plaintiff was elected and qualified as an officer in an office the tenure of which is during good behavior; that he was actually in the discharge of his duties as such officer; that he had not resigned nor been impeached; that any attempt by the board to displace him by the election of another person was done absolutely without power or authority, and that his attempted displacement was an absolute nullity; finding that in the petition presented in this case plaintiff, by pleadings containing not merely conclusions of law but recitals of fact, supported by documents annexed, shows affirmatively to the court both the absolute character of his own rights and the absolute want of power and authority of the Board of Commissioners in the premises; finding also that this litigation is limited to the ascertainment of the conflicting claims of the two veterinary surgeons themselves and that no question arises as to the effect upon third parties of any act done by Dr. Morice as being the act of a *de facto* officer, we are of the opinion that the plaintiff was justified in asking and the court warranted in granting the injunction which issued in this case.

We recognize that injunctions of this character should be granted only after the most careful examination by the judge to whom application for the same is made, inasmuch as there is danger of the judiciary being made to temporarily trench unintentionally upon powers legally committed to other departments of the government, or to special persons or tribunals, and inasmuch as public as well as private interests are almost necessarily more or less concerned in such proceedings.

If district judges would refrain from action until applicants should so frame their pleadings by recital of the facts on both sides, and until they should so support them by documents annexed as to clearly

satisfy them that the injunction if issued would be well taken, and if they would bring to bear before action their judicial knowledge (if such they have) of certain facts bearing on the particular case instead of granting injunctions as a matter of course upon pleadings reciting mere conclusions of law (skilfully prepared to suppress such portions of the facts of the case as if known would bar the remedy), instead of acting as a matter of course upon the assumption (false in most instances) that the injunction bond would fully and thoroughly protect and secure all interests at stake, the remedy by injunction in cases like the present would be conservative in its effects. The danger rests not in the remedy but in the carelessness or indifference of judges.

We are of opinion that the judgment appealed from is correct, and it is therefore affirmed.

No. 11,510.

STATE OF LOUISIANA VS. BAPTISTE HILL.

1. Whether neither the crime charged nor its punishment is dependent upon values—values need not be declared in the indictment.
2. Mere matters of evidence not necessary for the validity of an indictment are not necessary to be alleged in it in order to introduce under the indictment evidence pertinent and relevant to the charge.
3. If before the trial commences it is discovered that one of the jury is incompetent by reason of relationship to the accused, he may be legally set aside and the panel completed in the ordinary course.

APPEAL from the Eleventh District Court, Parish of St. Landry. *Perrault, J.*

M. J. Cunningham, Attorney General, and *E. B. Dubuisson*, District Attorney, for the State, Appellee:

Value need not be alleged in an indictment for horse stealing.

Although not alleged, it may be proved when it tends to show guilty knowledge.

A juror may be set aside after being sworn when it is discovered that he is incompetent.

John N. Ogden Attorney for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant was convicted of horse stealing and

sentenced to one year at hard labor in the penitentiary. He has appealed.

We will pass upon his grounds of complaint in the inverse order in which they were raised.

1. A motion in arrest was made on the ground that the indictment upon which he was tried did not allege any value in the property charged to have been stolen.

Neither the crime charged nor the punishment for the same was dependent upon the value of the thing stolen. The crime charged was a substantive one—independent of the value of the animal taken. There was therefore no reason for making reference to value in the indictment. State vs. Wells, 25 An. 372; State vs. Thomas, 28 An. 828; Bishop Cr. Pr., 3d Ed., Vol. 2, Sec. 713; Waterman's Archbold, Vol. 2, p. 384.

2. The court permitted the State to offer evidence to prove the value of the horse stolen over the objection made by the defendant that there was no declaration of value in the indictment.

The object of the testimony was to show that the horse, being in the possession of the defendant, was sold for an amount totally disproportionate to its value, and from this fact to infer that it had been stolen. No objection was made to the testimony itself as being irrelevant or improper. We have just said that there was no necessity for the validity of the indictment that it contain a recital of value The matter of value was purely one of evidence on the trial. If the question asked was a proper and relevant one it was admissible, without reference to any statement in the indictment on the subject, the indictment itself being sufficient. Statements not necessary to the validity of the indictment are no more necessary to be alleged in it than in a petition in order to introduce in evidence testimony pertinent and relevant to the issues.

3. When the case was called for trial, the first juror presented was sworn, he being accepted by both the State and the accused.

Eight others had been subsequently similarly accepted and sworn when the district attorney suggested to the court that the first juror sworn was an uncle of the accused and should be made to stand aside. The juror having admitted, when questioned, that the fact stated was true, the court, over the objection of the accused that the objection to the juror should have been urged on the *voir dire*, and

that if incompetent the juror's incompetency was not absolute but relative, ordered the juror to stand aside.

The judge states, in the bill of exceptions reserved to this action, that under the acts of 1877 and 1880 the juror, being related to the defendant within the fourth degree, was incompetent; that this incompetency was unknown to the State at the time of calling, examining and accepting the juror; that it had the right under its discretion to purge the jury of an incompetent juror at any time before evidence was offered, and that no injury could result to defendant by ordering him to stand aside.

There is no complaint that the accused had exhausted any peremptory challenges, or that an objectionable juror had been forced upon him.

We are of the opinion that if, before the trial commences, it is discovered that one of the jurors is incompetent, by reason of relationship to the accused, he may be set aside and the panel completed in the ordinary course. Lord Hale's Pleas of the Crown, Vol. 2, p. 296; Bishop Cr. Pr., 3d Ed., Vol. 1, Sec. 947; Thomp. and Mer. on Juries, Sec. 273; Wharton Cr. Pl. and Pr., Sec. 672; 2 An. 307; State vs. Disken, 34 An. 919; State vs. Nash & Barnett, 46 An. 194.

Judgment affirmed.

46 738
48 930
49 1348

46 738
50 813

46 738
105 869

46 738
114 211

46 738
120 33

No. 11,432.

SUCCESSION OF ROSEMOND TROXLER.

Though the issues raised in an opposition to an administrator's account may be such as to require to be disposed of by a direct action, the opposition may stand by way of notice.

In proper cases where the result of a pending suit is dependent upon the decision in another, proceedings in the first may be stayed to await that decision.

The actions of an administrator should be subjected to full investigation. Whenever they appear of questionable legality ratification of the same should be established by very clear proof. Whenever practicable light should be thrown in aid of right.

APPEAL from the Twenty-first Judicial District Court, Parish of St. Charles. *Rost, J.*

ON MOTION TO DISMISS.

T. J. Semmes & Legendre for the motion:

The judgment appealed from was rendered by the judge of the Twenty-first Judicial District Court in and for the parish of St. Charles.

Appellant's petition of appeal is addressed to the Twenty-sixth Judicial District Court, and his bond of appeal is made payable to the clerk of the Twenty-sixth Judicial District Court, a judicial district distinct and separate from the Twenty-first Judicial District.

Where a petition is addressed to a tribunal different from that in which it is filed, *held*, the error is fatal. 6 N. S. 417, Watson vs. Tiera; 1 R. 96, Wadsworth vs. Harris.

C. P. 575: "Appeal bonds in all cases of appeal shall be made payable to the clerk of the court which rendered the judgment appealed from." 22 An. 133, Jaffray vs. Bruff.

The judgment appealed from is rendered by the Twenty-first Judicial District Court. Appellant's appeal bond is payable to the clerk of the Twenty-sixth Judicial District Court.

No legal bond having been given, the appeal should be dismissed. 35 An. 363, Succession Calhoun.

Gus. A. Breaux contra:

The motion to dismiss is made because the petition of appeal and the bond furnished are addressed and made out to the Twenty-sixth Judicial District Court for the parish of St. Charles instead of the Twenty-first Judicial District Court, etc.

The succession was opened in the District Court for the parish of St. Charles, known under the Constitution of 1879, as the Twenty-sixth Judicial District Court.

In 1890 the State was redistricted, the number of judicial districts lessened, and St. Charles was assigned to the Twenty-first Judicial District.

All the proceedings, except the judgment entered by the clerk, were entitled the "Twenty-sixth Judicial District Court" instead of the "Twenty-first," but under the same original number and title of the docket and judicial district for St. Charles parish, including the exceptions filed to the opposition to be found at page 4 of the Record.

It is evident that the error was merely clerical and a natural one under the circumstances, misleading no one.

The appeal recites the title of the case, the judgment rendered and the court that rendered it.

There can be neither ambiguity nor uncertainty as to the judgment appealed from; nor can there be as to the responsibility of the surety on the bond. 35 An. 596, Klotz vs. McCready; 26 An. 318; 27 An. 271, 304; 45 An. 505.

T. J. Semmes & Legendre Attorneys for Administratrix, Appellee:

That the opponent can not attack sale of property made in 1882, for the reason that he received from the administratrix in March, 1891, his share of the proceeds of such sale under a final settlement; that he has thereby finally ratified it and is estopped from questioning its validity unless for error or fraud, neither of which is alleged. 21 An. 231, Douglas vs. Manning; Id. 581, Borden vs. Hope.

A receipt for money paid is not conclusive between the parties, but when the evidence offered is contradictory the receipt will stand. 29 An. 350, Haile vs. McGhee; 24 An. 318, Wells vs. Ernstein.

A final settlement can not be attacked without alleging error or fraud in the settlement. 15 An. 535, Williams vs. Springfield; 31 An. 100, Manson vs. Hoffman; 32 An. 121, Beard vs. Cash; 38 An. 645, Barrow vs. Barrow.

An heir or creditor who receives his share of the proceeds of a judicial sale thereby ratifies it, and is estopped from averring its nullity. 25 An. 54-125; 31 An. 100; 30 An. 838-947; 23 An. 17; 24 An. 253.

A final judgment rendered by a court of competent jurisdi tion and the public sale made by virtue of it can not be attacked collaterally. 39 An. 55; 20 An. 124; 19 An. 353; 6 R. 471; 25 An. 55; 28 An. 755.

A purchaser at probate sale is not bound to look beyond the decree of the court ordering the sale to ascertain the necessity for the sale. 30 An. 891, Sharkey vs. Blankston.

Where the proceeds of sale of succession property have been used to pay the debts of an estate, an heir can not reclaim the property without first tendering the sum thus used. 9 An. 84; 30 An. 878; 32 An. 91, 106.

Gus. A. Breaux Attorney for Opponent and Appellant:

There is no such thing as an estoppel in favor of an administrator or executor.

Nor is there an estoppel in favor of a party for an act he could have been compelled to do. Ryan vs. Steward, 60 N. Y. 413.

To give rise to an equitable estoppel there must have been a false representation of facts, not matters of opinion, made, with knowledge, to a party ignorant of the facts, with the intent they should be acted on, and the party must have been induced to act thereupon and changed his position for the worse. Bigelow on Estoppel, p. 552; Am. and Eng. Ency., Estoppel, pp. 12 *et seq.*

The instant opposition is one to an administratrix' account. The receipt given was fully susceptible of explanation.

The ratification of a transaction which is illegal and a nullity is a recognitive and confirmative act; unless it is shown to have taken place with a full knowledge of the circumstances, and formal intention to cure the radical vices contained in it, and with which it is infected, by an unreserved sanction and approval, it can not avail. 43 An. 382.

The opposition is an answer (Suc. Romero, 28 An. 607) and is therefore a direct attack upon the issue tendered by the tableau. But an order of sale can be attacked collaterally. Succession Thompson, 42 An. 121.

An administratrix having funds more than sufficient to pay the debts of the succession can not sell real estate. 44 An. 383.

A debt due the wife for separate funds collected by her husband during marriage is a community debt and must be paid by the community. C. C. 2372; Downs vs. Morrison, 13 An. 379; C. C. 2403; 12 An. 604; 12 An. 222.

Where the property sold is exclusively the separate property of the husband the administratrix can not legally be a purchaser. C. C. 1146; Acts 1854, p. 155.

In the instant case the opponent is an heir; the account is rendered to him and he is entitled to be heard.

The account of an administrator is rendered to the creditor and heir of the estate which he administers. 15 An. 228; 24 An. 435.

The opinion of the court was delivered by

NICHOLLS, C. J. Rosemond Troxler died in August, 1880, leaving a widow, several children and one grandchild, Rosemond Troxler,

Jr., child of a predeceased son. Three of the children were minors, and of these their mother was appointed and qualified natural tutrix. The grandchild was also a minor and his mother was appointed as his tutrix.

Upon the application of the widow an inventory was taken of the property of the succession on the 25th and 26th of October, 1880.

This property, as appears by the inventory, was valued at ten thousand seven hundred and eight dollars and seventy-two cents, and was all described as community property. The recapitulation shows:

Total value of real estate	$4,300 00
Total value of crops	2,600 00
Total value of movable property	1,828 15
Total value of active credits left by deceased, consisting of promissory notes, debts due said deceased by verbal obligation, and cash	1,980 57
Total amount	$10,708 72

In December, 1881, Mrs. Marie Troxler (the widow) filed a petition in which she alleged that the inventory which had been taken was erroneous, and that it was necessary that a new one should be made. She further averred that in order to settle the succession it was necessary that an administrator be appointed.

The inventory asked for was made on the 24th and 27th January, 1882, and the applicant was, after advertisement and delays, qualified as administratrix.

In the second inventory a certain tract of land which had been described in the first as community property was declared to be and inventoried as separate property of the deceased, and valued at three thousand dollars, and a one-fourth interest in a certain sugar house which likewise had been mentioned as belonging to the community was declared to have been erroneously so described and was inventoried as separate property of the husband and valued at five hundred dollars.

The sugar crop, which had been estimated at the sum of two thousand six hundred dollars, had been in the meantime manufactured and had netted not the amount stated, but the sum of one thousand and ninety-four dollars and ten cents, and the rice crop netted one hundred and forty dollars and ten cents instead of two hundred and twenty-five dollars, the sum it had been expected to realize.

In March, 1882, upon the application of the widow, who represented to the court that all of the property dependent upon the suc-

cession of her late husband (save that mentioned as separate in the second inventory) was community property, she was placed in possession of the same as usufructuary. Simultaneously with the application just mentioned she prayed for a sale of the separate property, declaring the sale to be necessary to pay the debts of the succession.

The property was sold under an order of court rendered upon this prayer, and at the sale the widow became the adjudicatee at the price of three thousand dollars.

On the 1st of June, 1882, the administratrix filed a petition in which she declared that as survivor in community she had claimed and been awarded the usufruct during her natural life of the proper y depending upon the community between herself and her husband; that the separate property as shown by the inventory consisted in a sugar plantation and the undivided one-fourth of a sugar house thereon; that she had caused said property to be sold according to an order of court to pay debts, and from said sale she had realized the sum of three thousand dollars, and that she presented a tableau showing the proper disposition to be made of that fund. She prayed that notice of the filing of said tableau be given by publication, and by personal service upon the heirs, and that all parties te ordered to show cause why the tableau should not be homologated and the administratrix authorized to make payments accordingly.

In the tableau referred to the administratrix charged herself with the sum of *three thousand dollars*, as proceeds of the sale of the separate property, and she proposed to account for that amount by paying out of that sum *five hundred and five dollars and ninety-three cents*, which seem to be the entire costs of the administration of the husband's succession, and *twenty-two hundred and seventy-three dollars and seventy-one cents* as an amount due to the administratrix individually by her husband's succession for a like amount of her separate funds received by her husband for her account, which had never been turned over to her, but had been expended by him.

The tableau closes by the following recapitulation and statement:

Amount of assets	$3,000 00
Amount of debts	2,889 64
Balance for distribution	$110 36
The heirs are five in number, making the share of each	$22 07

At the foot of the tableau we find the following statement:

I have examined the above and foregoing tableau and found the same to be correct, and have no objection to the same being homologated.

St. Charles, May A. D. 1882.

(Signed) JUSTINE BOURGEOIS.
FRANCOIS TROXLER.
EDOUARD TROXLER.
LOUISIANA TROXLER.
F. ST. MARTIN.

And under these signatures the following:

The within petition being considered the prayer thereof is granted.
St. Charles, May 31, A. D. 1882.

(Signed) M. HAHN, *Judge.*

We find no order homologating this tableau. Justine Bourgeois and Francois Troxler, who signed the above consent, were the tutrix and under-tutor of the minor Rosemond Troxler, Jr. This minor was emancipated and relieved from the disabilities which attach to minors on the 14th January, 1889, by judgment of court. Subsequently to this he signed the following receipt:

Received, parish of St. Charles, March 3, 1891, from Mistress Marie Polimine Troxler, widow of the late Rosemond Troxler, administratrix of her said husband's succession, the sum of thirty-one dollars and ninety cents, being amount due me as per tableau of distribution and interest thereon, filed June 1, 1882, as heir therein by representation of my father, Lucien Troxler, thirty-one dollars and ninety cents.

ROSEMOND TROXLER.

In October, 1891, he filed an opposition to the tableau of distribution which had been filed in the succession of his grandfather by the administratrix.

In this opposition he averred that he only became of age in the year 1891; that he opposed the tableau because it failed to account in any manner for the large personal property shown to have belonged to the estate in the hands of the administratrix which was much more than was sufficient to have paid any debt existing, and the sale of the real estate was illegal and unwarranted, because as there was in existence and in the hands of the administratrix funds and personal assets belonging to the community and estate of the deceased more

than sufficient to pay all indebtedness alleged to be due she could not legally ask for the sale of real estate, the separate prope ty of the deceased, to reimburse to herself her alleged paraphernal dues even if real, and this indebtedness was exclusively that of the community. That the sale to the administratrix was invalid, illegal, null and void because, further, as the judicial representative of the estate she could not purchase it at a sale provoked of the separate and sole property belonging to the estate. That the order of sale rendered March 1882, was illegally and improvidently issued and was a nullity.

The prayer of the opposition was that the tableau be rejected, annulled and set aside; that the sale of the real estate be decreed null and void and of no effect.

The administratrix excepted to the opposition on the ground—

1. That opponent could not attack the sale described, for the reason that he received from her in March, 1891, under a final settlement then made, his share of the proceeds of said sale; that he ratified it and is estopped from questioning its validity.

2. That said settlement can not be set aside unless it be for error or fraud, neither of which is alleged.

3. That he can not attack by an opposition the sale described in his petition; that a direct action is necessary.

4. That the property described in his opposition now belongs to J. C. Triche; that all parties in interest are not before the court.

5. That the decree of the court under which the sale was made can not be attacked collaterally.

On the trial judgment was rendered in favor of the administratrix and against the opponent, and dismissing the opposition.

In passing upon the case only one issue was examined and disposed of by the court. It held that the receipt given by the opponent as explained by his testimony was a complete ratification of the acts of the administratrix under Article 1875 of the Civil Code.

Opponent has appealed, and the administratrix has moved to dismiss the appeal upon the ground—

1. That the petition for appeal is not addressed to the court which rendered the judgment appealed from, it being addressed to the judge of the Twenty-sixth Judicial District Court instead of the Twenty-first Judicial District Court.

2. That the bond of appeal is made payable to the clerk of a dis-

trict different from the one in which the case was tried and decided, said case having been tried and decided by the Twenty-first Judicial District Court for the parish of St. Charles, and the said bond being made payable to the clerk of the Twenty-sixth Judicial District Court for the parish of St. Charles.

The designation of the district as the Twenty-sixth Judicial District was an immaterial clerical error. The proceedings were all carried on in the Judicial District Court of the State of Louisiana for the parish of St. Charles. The petition of appeal was addressed to that court, and the bond was made payable to the clerk of that court. That was sufficient (see Clark vs. Comford, 45 An. 502).

The motion to dismiss must be and is overruled.

The district judge having expressly referred to the testimony of the opponent in connection with the receipt, it may be well, as it is not long, to state it. He stated: "I was given no written statement (no written papers were submitted to me) at the time I signed that receipt. The nature of the settlement made with me on March 3, 1891, explained nothing to me. Mr. Triche (the person acting for the administratrix in the matter of the payment) told me at that time that that was my money, and that he wanted to pay it. I was shown none of the succession papers, and was told nothing about them." On cross-examination he stated that the account of the administratrix was not shown to him; that he figured the amount of interest due him—he knew what he was about—he did not remember what was the result of the calculation; he received from Mr. Triche thirty-one dollars and ninety cents. That his grandmother promised to give him one hundred dollars; he told Mr. Triche at the time of the settlement that his grandmother had promised him one hundred dollars. Triche told him that was all she gave him to give him; then he took it. That the settlement is incorrect, because she gave the others one hundred dollars and she promised his mother to give him one hundred dollars, so his mother told him; that he did not know to what he was entitled; he did not say the settlement of March 3 was incorrect; he did say his grandmother promised his mother one hundred dollars; he knew nothing about it; he knew that his grandmother gave her other children one hundred dollars, because she told his mother and she told him; that he did not know what he was entitled to as heir of his grandfather; he did not know what the debts of his estate

amounted to; he was 22 years of age; came of age on the 5th of February, 1891; he knew that a proper settlement of the estate, according to law, would show what he was entitled to, and he had employed a lawyer to find that out.

J. C. Triche (who, as we have said, was the party representing the administratrix in the payment), being placed upon the stand, deposed that he showed the opponent the account in the succession of Troxler, and that he took the figures therefrom and computed the interest thereon; that he (witness) took the account and took the amount therefrom for his calculation and he told the opponent the amount.

This witness is a son-in-law of the administratrix, and is, we presume, the party referred to in the pleadings as the present owner of the property whose sale is attacked, he holding it by purchase from the administratrix after she had herself bought it. Opponent's counsel is in error in stating that the act of sale to J. C. Triche was never offered in evidence, and that it is improperly in the record. The act was offered and admitted over opponent's objection (see page 38 of the transcript) and a bill of exception was reserved.

We are of the opinion that the issue which the opponent tendered and seeks to have disposed of touching the legality of the sale made in the matter of the succession of his grandfather can not, at this time and in the present form, be passed upon; that a direct action for that purpose would be necessary, and, inasmuch as the property appears to have passed into the hands of a third person, that it would be proper to make him a party to that suit. 15 An. 228, Cather vs. Kerr; Succession of Sanchez, 41 An. 506.

If such an action were brought, and should terminate favorably to the plaintiff, the direct result of the decision would be to do away with the account filed by the administratrix. That account is not a general settlement of the affairs of the succession of Rosemond Troxler, carrying with it, as incidental thereto, a full and complete settlement of the community of acquets and gains. The account is nothing more than a proposed application of the fund or price arising from the succession sale of a specific piece of real estate, which belonged to the separate estate of the deceased, and of which she had become the adjudicatee, to the payment of a claim alleged by the administratrix to be due to her by reason of her husband having received and expended and not accounted for certain of her para-

phernal funds, and to the further payment of the entire expenses of the administration of the succession.

The administratrix singled out one particular act in her administration and made it the basis and sole basis of the account she filed.

There has been no attempt even up to date to liquidate the community, and, prior to her appointment as administratrix, the widow had caused herself, by an *ex parte* order, to be placed in possession of all the community property as usufructuary, under the act of 1844. Succession of Fitzwilliam, 8 An. 489; Succession of Bringier, 4 An. 389; Day vs. Collins, 5 An. 588.

At the time of the death of her husband very considerable property, real and personal rights and credits, were left belonging to that community.

The property of the separate estate, consisting of a small plantation and an interest in the sugar house, which were inventoried together at thirty-five hundred dollars, was subsequently purchased by her, at a succession sale which was made upon the *ex parte* application of the administratrix, as necessary to pay debts by the administratrix, at three thousand dollars.

The small balance left after payment of the expenses of administration and the claim of the widow is declared to be the amount due to the heirs of the husband, and it is the receipt by the opponent of the one-fifth of this amount upon which the District Court acted in reaching its conclusions.

Prima facie the receipt and expenditure by a husband of the paraphernal funds of the wife would give rise to a debt by the community, and would be primarily payable out of community assets (Lawson vs. Lawson, 12 An. 604; Downs vs. Morr son, 13 An. 379). We say *prima facie*, for the husband's separate estate might, under exceptional circumstances, be held liable for a claim of that character as for a debt due by himself individually.

The manner in which the succession of Troxler has been conducted has not been such as to impress us as calculated to lead up to correct legal results. It will be seen from the recitals made that even should plaintiff fail in an attempt to have the succession sale set aside, he would still be in position to question the application of the price as attempted to be made, unless by some act of his own he has deprived himself of that right. If he has done so, it would be upon the theory of a ratification by him of everything which had

been done. We are not satisfied that opponent at the time he received the money had such a knowledge of the situation as should bind him by ratification. Rives vs. Bernard, 13 La. 168; Bennett vs. Bennett, 12 An. 254; Williams vs. Palace Car Co., 40 An. 93; Rist vs. Hartner, 44 An. 382; Breaux vs. Sarvoie, 39 An. 246.

As between the parties to transactions whose legality is fairly debatable, the doctrine of ratification should not be too rigidly applied. Light should be permitted to be thrown in as far as possible in aid of right. We are exceedingly doubtful whether opponent was aware that the property which was sold had been dealt with as the separate property of the grandfather, or whether he knew the circumstances under which the funds of the grandmother had been received by him, or how they had been applied. In commenting upon the administration of the widow, we leave matters completely at large, our remarks being intended simply as explanatory of our reasons for doing so. We think the ends of justice would be best attained in this case by subjecting the administration to full investigation and to the tests of law.

Although in this case the legality of the succession sale can not be passed upon the opposition filed is not without some effect upon that question. In the Succession of Bartlett, 21 An. 532 (on rehearing), an opposition which was dismissed for want of jurisdiction was none the less held good as a notice, and in the Succession of Sanchez, 41 An. 506, the court, referring to the opposition in that case, recognized that accounts could sometimes be properly withheld from homologation to await judgment in another suit, which, when decided, might have a controlling influence on the pending case.

In the case at bar we feel satisfied that all the claims for succession expenses have been paid by the usufructuary, whose duty it was to have done so long ago, and that the payment of no debts will be held up by the non-homologation of the account for the present.

For the reasons assigned it is ordered, adjudged and decreed that the judgment of the District Court be and the same is hereby annulled, avoided and reversed, and this case is hereby remanded to the lower court for further proceedings according to law, with leave granted to the opponent to amend his pleadings.

Rehearing refused.

No. 11,374.

JOHN R. CAWTHON VS. W. E. KIMBELL ET AL.

An amended answer is permitted when it amplifies a general denial and enumerates the reasons why plaintiff should not recover and does not change the relief prayed for in the original answer, and is really in the furtherance of justice.

An heir to whom a slave has been donated is bound to collate the value of the slave notwithstanding he was emancipated.

The heir who accepts a donation and takes possession of the property can not repudiate the title under which he holds said property, retain the same, and claim exemption from the obligation of collating. The donation may be null as not being in conformity to law regulating the manner by which they should be executed, yet the informality *per se* of the act can not be urged by the donee to the prejudice of the other heirs.

ON APPLICATION FOR REHEARING.

The grandson it is claimed owed as a collation to the succession of his grandfather the value of a slave.

The only evidence offered in support of the title by donation was a receipt under private signature signed by his mother in 1861, who acknowledged receipt of the slave from her father (who was the grandfather of plaintiff).

The donation was null for matters of form.

The nullity was not cured by the delivery of the slave.

A donation *inter vivos* of real property, null for want of form prescribed by law can not be confirmed by the donor years after the death of the donee, and after the slave donated had been emancipated.

The confirmative act consists of the donor's testimony in a suit *inter alios* to the effect that he had made the donation.

The grandfather's testimony was not given with the view of confirming the donation or with the intention of charging his grandson with the value of the slave.

The grandson does not owe collation, as he (or his mother) never had title to the slave.

The judgment of the District Court is annulled in order that settlement may be made with plaintiff without deducting from his portion any amount claimed as collation for the value of a slave.

APPEAL from the Third District Court, Parish of Claiborne.
Barksdale, J.

John A. Richardson for Plaintiff and Appellant:

The plea of payment admits the existence of the debt, if defendant does not make good his plea. 3 N. S. 273; 12 L. 397; 14 An. 54; 25 An. 182.

After pleading payment defendant can not withdraw the plea to deny the debt. 26 An. 630.

An amendment to an answer will not be allowed which substantially changes the defence. 30 An. 1099.

The plea of payment admits the debt, and any amendment that would throw on plaintiff the burden of proving the debt changes the defence and is not admissible.

An act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property, of slaves or incorporeal things, such as rents, credits, rights or actions under the penalty of nullity. C. C. 1523, Code of 1825 (this is the same article as 1536 of the present code, only the words "of slaves" are omitted). 34 An. 448; 23 An. 242; 22 An. 359; 4 N. S. 468.

The donor can not, by any confirmative act, supply the defects of a donation *inter vivos* null in form; it must be executed again in legal form. C. C. 2273 (2253).

The heirs or assigns of the donor, during his, the donor's life, can not confirm or ratify donations null in form. C. C. 2274 (2254); 6 R. 229.

A donation of a slave in 1861 null in form, the donor dying in 1888, the burden of showing a ratification or confirmation of said donation rests on the party whose interest it is to establish the fact.

Slaves donated prior or during the war, and liberated before the death of the donor, while in the possession of the donee, are not subject to collation. 29 An. 495; 34 An. 443; 40 An. 334.

In 14 L. 352, Burton vs. Burton, the court, acting on the presumption that the law of Georgia on the subject of donation was the same as ours, held (p. 356) that slaves *received as gifts* (without an act of donation) were the objects of donation, and subject to collation according to the laws of Louisiana, and held, and forced the collation of the same, in a proceeding like this. *Vide* 19 L. 263, Gillespie vs. Day.

40 An. 334, Succession of R. H. and Sarah J. Hallie—the question here being almost identical to the one at bar, the question of the collation of slaves in which there was *no written* act of donation. The court held that the fact there was no written act was "insignificant," as no one disputed her *right* to them, and she acted as the *owner*. Here Mrs. Stewart admitted she received the slaves, but resisted the collation for the reason there was no written act of donation. The court held she must collate. In the case at bar, plaintiff admits in the record she received the

slave as stated in the receipt, but resists collation for it because the act was not passed before a notary. We submit that is "insignificant," as no one is disputing the title, and she acted as the owner and should collate.

We also refer the court: 3 An. 522; 9 An. 291; 34 An. 440; 36 An. 744; 10 An. 504.

The plaintiff admits that "Mrs. Emily Cawthon received one thousand five hundred dollars, as shown by receipt attached to answer, to be accounted for in some way (out of the succession of John Kimbell), if subject to collation under the law." This admission precludes and estops plaintiffs from urging any defects in the title that Mrs. Cawthon may have had to the negro. He admits that his mother received this negro from John Kimbell as an advance, and that she was to *account for* it out of the estate of John Kimbell. The expression "if subject to collation under the law" had reference exclusively to the question of the "emancipation of slavery before the death of the donor," and can not refer to the question of title to the slave.

Representation, which takes place in the case of a child coming to the succession in place of his father deceased before the opening of the succession, should not be confounded with transmission, which takes place when the father, called to the succession, dies after it is opened, without becoming full heir by acceptance. He transmits his right to his heir, who can not exercise it without accepting his succession, since the right forms part of it. He, then, who comes to the succession by representation comes *suo jure*, and who comes by transmission *alieno jure*.

Representation is limited to descendants, and to brothers and sisters and their descendants. So, representation can not take place in favor of the cousins of the deceased (7 N. S. 336); nor is it admitted at all in irregular successions, except in the case of a natural child. C. C. 923; Succession of Debreuil, 25 An. 372.

The question is, does this plaintiff inherit in his own right or is it by representation? for it may be claimed under Art. 1240, C. C., that he comes in in his own right and is not required to collate gifts, etc., made to his mother, while our contention is, he inherits by representation, and is compelled to collate, etc.

C. C., Art. 1240: "In like manner, the grandchild, when inheriting in his own right from the grandfather or grandmother, is not obliged to refund the gifts made to his father, even though he should have accepted the succession; but if the grandchild comes in only by right of representation, he must collate what had been given to his father, even though he should have renounced his inheritance."

The case of Calhoun vs. Crossgrove, 38 An. 1004, cited by plaintiff, does not apply to the facts of this case. In that case it is a "debt" which is the object of collation, while in the case at bar it is "an advance" that the plaintiff is called on to account for. The court, in the Crossgrove case, strongly intimates that if the amount had been given as "an advance" the decision would have been otherwise.

Defendants insist that this plaintiff comes in "by representatives," and is bound to collate the property mentioned in the receipt by taking less. They rely on Succession of Meyer, 44 An. 871.

Joel W. Holbert Attorney for Defendant and Appellee:

The opinion of the court was delivered by

McENERY, J. John Kimbell was twice married. By the first marriage there were five children; by the second four. The first wife died in 1851, and the second marriage was celebrated in May, 1853. John Kimbell died in 1888, leaving the second wife surviving.

Emily Kimbell, issue of the first marriage, married A. L. Cawthon. John R. Cawthon, the plaintiff, is the issue of this marriage. His mother died in 1861, and his father in 1863.

The plaintiff instituted this suit against the surviving widow and the heirs of the second marriage, alleging that John Kimbell, his grandfather, brought twenty-eight hundred acres of land and some lots in the town of Homer and some personal property into the second community which was his grandfather's separate property, and valued at thirteen thousand four hundred and fifty dollars, and is entitled as heir of John Kimbell to one-eighth of all this property and

one-sixteenth of the personal property acquired during the second community, and in his possession at the time of his death.

His one-eighth interest is valued at one thousand nine hundred and five dollars. There was a partition of the property among the heirs of John Kimbell by the second marriage. This partition is attacked, and there is a prayer for it to be declared null and void, and that the land be restored to the succession of John Kimbell.

This land, it is alleged, embraced fifteen hundred acres, the balance remaining after having made donations to his children, and which the second wife and the four children by the second marriage partitioned among themselves. He prays for a moneyed judgment for his interest in all the property, with five per cent. interest from the death of John Kimbell, his grandfather, in default of returning the property to the succession.

In answer the defendants admit plaintiff is the heir of John Kimbell and plead a general denial, and averred that he had no interest in the succession of John Kimbell, as he had received more than his share in the estate of his grandfather during his lifetime, and that his mother had been settled with for her share in the estate of Cynthia Kimbell, her mother, and prayed that plaintiff's demand be rejected.

Before the case was set for trial the defendants filed a lengthy amended answer amplifying their original answer. This amended answer in no way changes the substance of the original answer, but enumerates the reasons why plaintiff should not recover by alleging that the land claimed by plaintiff was disposed of during John Kimbell's lifetime; that the personal property perished during his lifetime; that his mother had received an advance from the estate of John Kimbell, and was bound to collate the same.

There is no allegation of any fact in the answer that could not be proven under the original answer. It does not in any way change the original answer, and in the sound discretion of the court it was permissible in the furtherance of justice, as there was no injury to plaintiff or prejudice to his rights. The amended answer contains allegations also that are only legal inferences from facts stated. There was judgment rejecting plaintiff's demand, and he has appealed.

The statement in the record shows that John Kimbell owned in his lifetime two thousand acres of land. The deeds show that he

disposed of one thousand seven hundred and fifteen acres, but there was error as to one hundred and twenty acres in the description, this amount not having been sold or parted with. This left four hundred and five acres on hand at his death. The defendants, however, admit that there were four hundred and sixty-nine acres on hand at the time of his death, which were partitioned among the four heirs and widow. The movables amounted to four hundred and fifty dollars. He gave to his children, exclusive of amount given to plaintiff's mother, seven thousand three hundred and eighty-five dollars. Add to this the amount given to the plaintiff's mother, the sum of fifteen hundred dollars, and the value of the land and the personal property of the succession, the amount to be distributed would be the sum of eleven thousand three hundred and ninety-two dollars, each heir's share being one thousand four hundred and twenty-four dollars, which shows that the plaintiff has received more than his portion of his grandfather's succession.

The plaintiff attacks the donation made to his mother because it does not conform to Article 1536, Revised Civil Code, which says that "an act shall be passed before a notary public and two witnesses of any donation *inter vivos* of immovable property or incorporeal things," etc.

The real contention is in relation to the donation of the slave.

The act of donation is as follows:

"Claiborne, La., received of John Kimbell the sum of seven hundred dollars in full of my interest in the succession of my mother, Cynthia Kimbell, deceased, and the sum of three hundred dollars in full of my interest in the estate and succession of my brother, John Randolph Kimbell, deceased, and the sum of fifteen hundred dollars, to-wit: a boy Billy, at thirteen hundred and fifty, and one hundred and fifty in money, to be charged to me from John Kimbell as his property in his succession and estate, this the 4th day of June, A. D. 1861. EMILY KIMBELL."

"I authorize my wife to sign the above and bind herself.

"A. T. CAWTHON."

The above receipt shows that the donation was executed and therefore accepted by the donee. C. C. 1541.

The plaintiff contends that as the donor in his lifetime never confirmed this donation to supply the defects in the original act, it

null and void, and no title to the property ever passed from him. So far as the donee is concerned, he can not retain the property and attack the donation, escaping the obligation of accounting for the same.

Having accepted the donation and being in possession of the effects donated, as to him it is perfected. In the case of Gillespie vs. Day, 19 La. 263, it was held that where the father made a verbal donation of a slave to a son, and at the death of his son as one of the members of a family meeting he advised that the property be sold as the property of the minor child of the deceased, he can not claim back either the slave or the proceeds, although the donation *per se* did not divest him of title. In the instant case in a judicial proceeding the grandfather acknowledged the donation to his daughter to the property donated in order to confirm title to the same to his grandson in the matter of his tutorship. We think the principle enunciated in the case referred to appropriately applies to this.

But independent of this the rule is universal in jurisprudence that a party can not retain the thing and repudiate the title by which he holds possession of it. Therefore if the plaintiff wants to participate in the succession of his grandfather he must account for what he has received as an advance in said succession. He can not retain the advance and come in and participate and thus destroy that equality which the law says must exist among the heirs.

The emancipation of the slave did not relieve the plaintiff from the obligation to collate that which his mother had received from his grandfather's estate. The property—the slave—was inherited by him from his mother and was a part of her estate when she died.

The donation of the slave was made in pursuance of Arts. 1361 and 1362 of the Code of 1825, which say:

Art. 1361. "When slaves have been given, the donee is not permitted to collate them in kind; he is bound to collate for them by taking less, according to the value of the slaves at the time of the donation."

Art. 1362. "Therefore the donation of slaves contains an absolute transfer of the rights of the donor to the donee in the slaves thus given. They are at the risk of the donee, who is bound to support their loss or deterioration, at the same time that he profits by the children born of them; and if the donee dispose in good faith of all or any of the slaves, the action of revendication for recovering the

slaves on the part of his co-heirs for the collation due to them will not lie against those who are the purchasers or holders of the slaves."

The donation of the slave invested the donee absolutely with title to him. He was at his risk, and he must collate his value no matter in what manner the donee lost him, whether by sale, death, by theft, or by emancipation.

But this is no longer an open question. The jurisprudence on this point is firmly fixed. Slaves donated and lost by emancipation while in the possession and ownership of the donee do not relieve the donee from the obligation of collating their value. Ventress vs. Brown, 34 An. 457; Succession of Hale, 40 An. 335; Succession of Meyer, 44 An. 871.

We find no error in the judgment appealed from.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

BREAUX, J. The careful attention heretofore given to this case relieves us from the necessity of restating all the facts.

We will only restate those facts material to a decision of the question remaining an issue between the parties to the suit.

Counsel for the plaintiff admits that all the points in the case heretofore decided were correctly decided, except one, he contends.

The excepted and disputed point relates to the alleged donation of a negro.

In the year 1861 the mother of plaintiff, authorized by her husband, executed a receipt for the slave valued at thirteen hundred and fifty dollars, and one hundred and fifty dollars in money as an advance upon her share, to be accounted for in the settlement of her father's succession.

Her father, the alleged donor, was not a party to the receipt, and there is no evidence, other than this receipt, of an intended donation.

The defendant pleads ratification. This alleged ratification consisted of testimony of plaintiff's grandfather, given in a suit brought by J. A. Cawthon *et al.* vs. J. E. Cawthon, to which the witness, John Kimbell, the said grandfather, was not a party and in which none of the issues of the case at bar were involved. He deposed that he held the receipt in question, showing that his daughter had been placed in possession of the slave as stated in the receipt.

The receipt was not in the form required to establish a donation *inter vivos* of property it is contended was donated.

It is elementary that in a donation form is of the essence, and that to have a binding force the act shall be passed before a notary public and two witnesses, of immovable property, including under the law, slaves at the date of the donation.

We have said that donations *inter vivos* are solemn contracts, subjected to certain forms, without which they are inexistent.

To form a particular importance is given, as it completes and gives life to the act; *forma dat esse rei.*

The solemnity is established by the notarial act.

The offer of the donor and the acceptance of the donee are valid after signing the act.

The alleged donor was not at all a party to the receipt.

As a donation it was originally an absolute nullity. It was not translative of title.

Whether there was a confirmative act, confirming in effect the donation alleged, is the next question at issue.

If there was no confirming act there was no donation.

We have already stated that the act of confirmation urged by counsel for the defendant is the deposition of the donor, in a suit, in which the plaintiff, the heir of the alleged donee, was not a party.

The testimony of the alleged donor was not given, after it had become evident that he was aware of any defect of form, and that it was his intention, by testifying as he testified, to confirm a donation.

In support of defendant's contention that there was confirmation of the receipt in question, giving it the effect of an act of donation, we are referred to a number of cases as applying.

The first cited case is that of Gillespie vs. Day, 19 L. 263.

The defendant Day claimed the price of a slave he alleged had been loaned or given by verbal agreement to his son.

The court held that, conceding the title to have been previously in him, and that the verbal donation *per se* was insufficient to divest him, yet the defendant as a member of the family meeting advised the sale of the property and suffered the slave to be sold as the property of his son, and in the act of partition in the record, signed by the defendant, the price of the slave is set down as forming part of the estate which came into his hand as tutor of the minor. The slave as donated property was not involved.

The contest related to the proceeds of the sale.

It was so much in cash, the father and tutor had judicially admitted (in proceedings, in effect contradictory), was owned by his son.

The court held him bound by his declaration without regard to any intended donation of a slave. There was virtually a manual gift of an amount in cash. A delivery *de manu in manum*.

In Deschapelles vs. Lebarre, 3 An. 522, a donation void in form, confirmed by the heirs, was held valid under the special provision of the code authorizing the heirs to confirm a donation. Under that article heirs may be held bound by their voluntary execution of the donation.

From that decision we quote: "The title of the heirs of the donee to the property donated was rendered perfect by confirmation" by the heirs.

An entirely different question from that involved on this point in the case at bar, in which the heirs of the donee have never confirmed the contract of donation by any act or declaration whatever.

In Ventress vs. Brown, 34 An. 457, and in Succession of Hale, 40 An. 335, the form of the donation was not involved as between the donor and donee. In the first case—that of Ventress—the confirmation had been made by the heirs of the donor under Art. 2274 of the Civil Code.

In the second case—that of the Succession of Hale—the right of the donee to the slave was not questioned at all. She, the donee, contended that the emancipation of the slaves relieved her from the obligation of collating slaves donated to her, and rested her defence principally upon that ground.

In the case under discussion, the point is raised that the writing is not the writing of the donor; that it is only a receipt of the alleged donee.

To sustain the plea of donation would add an obligation to be discharged by the heir of the alleged donee many years after the opening of the succession and after the loss of the property not donated in compliance with the required form.

The possession of the slave by plaintiff's mother, and the fact that the delivery dates about the time the receipt was executed, are not equivalents to confirming acts.

The terms of the law are absolute, and delivery of the property does not give validity to a contract of donation null for the want of

form. Baudry de Lacantiniere, Vol. 2, p. 872; Toullier, Vol. 4, p. 472.

Judge Mathews, for the court, said, in the case of William vs. Horton, 4 N. S. 469: "But according to our law in relation to titles by which property is held, a written instrument is required in order to transfer slaves from one proprietor to another; and when the evidence offered in support of title to them is an act of donation, to give it validity it must appear clothed with all the formalities required by law and sanctioned by an authentic deed. Mere possession is not evidence of title. * * *

"In this species of contract forms appear to assume the place of substance."

In Harlin vs. Leglise, 8 R. 194, this court reiterated that which had been decided in the 4 N. S. 469, that an omission of form is not cured by the delivery of the slave.

In Packwood vs. Dorsey, 6 R. 331, the reasons for the judgment were given at some length.

It is useless to repeat them. It will suffice to state the general propositions discussed.

The donation of real property must be executed before a notary and two witnesses.

A donation, null, can not be ratified by any confirmative act on the part of the donor and the voluntary execution of the donation by the donor will not prevent him from sustaining the plea of nullity.

In the decision the court controverts the doctrine of Toullier, that a void donation can be rendered valid by ratification, express or implied, on the part of the donor.

It leads, the court says, in that case, to an absurd conclusion, that while under the law no express confirmation or ratification can render valid a donation under private signature, it can be made so by the tacit ratification resulting from the voluntary execution of it by the donor.

"It would, moreover, render completely inoperative the positive provision of our law, that a donation, null for want of any of the requisite formalities must be made anew in legal form. This provision alone surely excludes the idea that a void donation can be rendered valid by any ratification, either express or tacit, on the part of the donor."

A long list of names of French commentators expressing views

different from those of Toullier is copied in the body of the opinion.

The decisions of this court just reviewed accord with the commentators who differ from Toullier.

If we were to accept the doctrine of the latter, *i. e.*, of Toullier, this case would not fall under its grasp, for there was no ratification, either expressed or implied, such as could cure the nullity pleaded by plaintiff.

We have considered this question with care, and have reached our conclusion despite our desire to affirm our previously expressed opinion upon this point.

Our former decree remains unchanged, except in so far as may be necessary in order to carry out our views as herein expressed.

Our learned brother of the District Court, as usual with him, has carefully cast the account of the heirs and made the following statement:

Value of lands	$1,467
Value of movables	450
Amount paid Mrs. Key	1,000
Amount paid Mrs. G. I. Kimbell	1,000
Amount paid Mrs. Jones	1,000
Amount paid Mrs. W. E. Kimbell	800
Amount paid Mrs. Andrews	1,035
Amount paid Mrs. S. L. Kimbell	1,140
Amount paid Mrs. Nelson	1,000
	$8,892

Counsel for the plaintiff and appellant, regarding these and other items involved, says in his brief:

"There is only one question or point which we claim is in error in coming to its conclusion in this case.

"The other points decided are correct law, but the whole decision is based on the point we claim the error consists, 'Having accepted the donation and being in possession of the effects donated, as to him, it is perfect.' If the court is correct in this proposition, the decision is correct; if incorrect, then the case is with the plaintiff."

We do not understand that the defendant and appellee dispute the correctness of these and other items of the account.

The whole contest centred in the question of collating, *vel non*, the value of a slave, not donated in due form.

In the present condition of the case another judgment must be entered; in view of the admissions of the correctness of certain items, presumably it will be final, before the court of the first instance.

The debits and credits will now be established and balances fixed, and the amount coming to each heir settled.

It is therefore ordered, adjudged and decreed that our former decree in this case be avoided and reversed, and it is further ordered, adjudged and decreed that the judgment appealed from be reversed and set aside, and it is now ordered, adjudged and decreed that there be judgment for plaintiff, decreeing that he is not obliged to collate the thirteen hundred and fifty dollars, value of the slave for which his late mother executed a receipt in 1861.

It is further ordered, adjudged and decreed that this case be remanded to be tried in accordance with the views herein expressed.

The defendant and appellees are condemned to pay the cost of appeal.

Those of the District Court are to be paid by the party cast on final decision in that court.

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No. 11,531.

FERDINAND GUMBEL & CO. VS. J. A. BOYER AND SHERIFF, AND J. A. BOYER VS. CLIFTON CANNON, SHERIFF (CONSOLIDATED).

The holder of a concurrent mortgage note has the right to assert his preference for payment on the proceeds of the sale of the mortgaged property over the transferrer, the payee of the note, by third opposition.

While it may not be necessary to make the mortgagor a party, it is not fatal to the proceedings if he is made a party defendant, and a personal judgment prayed for as against him. These matters concern the mortgagor and in no way affect the mortgagee, who is interested only so far as the opposition is concerned with contesting the preference claim of the third opponent.

If the agent of the maker of a mortgage note has no funds of the principal in his possession there is no reason why, on the request of the principal, he can not buy for his own account the mortgage note and hold it as security for the amount advanced for the principal.

If the agent has money of the principal in his possession and purchases the note, and makes a payment thereon with the funds of the principal, this payment will be considered as having been made by the principal, and the mortgage will be extinguished by confusion to the amount of the payment.

A mere indorsement of the note carries with it the mortgage security.

The offer of testimony to show in what manner the agent acquired the note is not a contradiction of the indorsement when it is restricted as to whether the agent purchased the note for his own account with his funds, or for his principal with the latter's funds.

APPEAL from the Tenth District Court, Parish of Avoyelles.
Coco, J.

G. H. Couvillon for Gumble & Co., Plaintiffs and Appellees.

Wm. H. Peterman and *Clegg & Thorpe* for Boyer *et al.*, Defendants and Appellants.

The opinion of the court was delivered by

McENERY, J. Ferdinand Gumbel & Co., cotton factors and commission merchants in the city of New Orleans, alleging themselves to be the owners of a promissory note for the sum of three thousand three hundred dollars secured by vendor's privilege and special mortgage on certain property situated in Avoyelles parish, dated 8th December, 1891, payable on demand with eight per cent interest, intervened, by way of third opposition, in the suit of the vendor against the vendee, Joseph V. Moreau, to foreclose the mortgage and enforce the vendee's privilege, claiming a preference in the proceeds of sale over the vendor, the transferrer of the concurrent mortgage note held by third opponents.

Exceptions were filed of no cause of action and misjoinder of parties. The theory upon which the exception of no cause of action is based is that the mortgage note held by Gumbel & Co. is a separate special mortgage. But this is not a fact. It is a concurrent mortgage note, and the proceeding by third opposition to share in the proceeds was proper.

The defendant, Moreau, was joined in the suit instituted by third opponent. This may not have been necessary, but it was not fatal. It in no way affected the defendant, Boyer. Nor did the prayer for a personal judgment against Moreau, the mortgage debtor, concern him. Moreau is not complaining. The defendant, Boyer, is only interested in the proceedings against the property or its proceeds. So far as these are involved he is properly before the court, and has no interest whatever in the personal judgment prayed for against Moreau.

J. A. Boyer, the vendor, answered, denying that the third opponents had any privilege or mortgage on said property described in the petition entitling him to be paid in preference to the vendor and and transferrer of the note. Boyer, with leave of court, amended his answer and declared that the intervenors and third opponents never purchased said note from him, but paid the same for the mortgagor, thus extinguishing and destroying the mortgage.

The third opponents objected to the filing of the amended answer

on the ground that it altered and changed the substance of the original answer. We do not perceive any alteration of the original answer. That denied that the opponents had any mortgage or privilege on the property, and the amended answer only set out the particular fact on which the general averment in the answer was based.

Under these circumstances the amended answer was properly allowed to be filed.

The law applicable to the controversy herein is well settled.

There is only question of fact involved, and the sole question is whether Gumbel & Co. acquired the note subject to a credit of one thousand five hundred dollars and seventy cents, which was paid out of funds in their hands belonging to Moreau, the maker of the note.

The transfer of the note and the indorsement thereon does not prevent this inquiry, as the transfer and ownership of the note is not questioned.

Testimony was improperly rejected to show the fact stated above, the judge ruling that the indorsement on the note could not be contradicted.

Boyer sold the property to Moreau for three thousand three hundred dollars, payable on demand, and on a credit for the balance of the price. The several payments were evidenced by promissory notes payable to Boyer and secured by vendor's privilege and special mortgage.

The following letter was addressed to Gumbel & Co. by Moreau:

"COTTONPORT, La., December 21, 1891.

"*Messrs. F. Gumbel & Co., New Orleans:*

"DEAR SIRS—I have bought Mr. J. A. Boyer's plantation at Moreauville, with saw-mill and cotton gin. He will call on you in a day or two with a mortgage note of three thousand three hu dred dollars; but I paid on said note three hundred dollars. Please pay the three thousand dollars for me, and should I not have that amount to my credit hold the note against me until I ship all my cotton. I have three hundred and thirty bales and have shipped three hundred, and will ship the balance as soon as possible. * * *

"Yours truly,

"J. V. MOREAU."

To this letter, Gumbel & Co. replied as follows:

"NEW ORLEANS, December 22, 1891.

"*Mr. J. V. Moreau, Cottonport, La.:*

"DEAR SIR—In reply to your favor of the 21st instant, we will say we must decline in complying with your request, for two reasons: first of all, we will not pay the mortgage note of Mr. J. A. Boyer, drawn by you in his favor, and, secondly, we can not recognize your letter of above date, as it is neither written or signed by you.

"Now, if you will write us to BUY the note in question, and write and sign the letter yourself, all will be satisfactory. We will buy the note and hold it until you ship enough cotton to cover.

"Mr. J. A. Boyer understands the situation.

"Awaiting your reply, we remain,

"Truly yours,

"FERDINAND GUMBEL & Co.

"P. S.—*Write your own letter.*"

Moreau answered this letter as follows:

"COTTONPORT, December 29, 1891.

"*F. Gumbel & Co., New Orleans, La.:*

"DEAR SIRS—Please find enclosed bill of lading for four bales of cotton; also, please go and buy my note of J. A. Boyer, which is in Mr. Charles Hernandez' hands, and keep the said note until paid, and send me a receipt for the note, or you hold it for security and I will ship enough to pay all due you, if the roads don't get bad.

"Very respectfully,

"J. D. MOREAU."

These letters, which were introduced by the plaintiff in the executory process, show that Gumbel & Co. declined to pay the note for Moreau, as his factor or agent, but consented to purchase it on their own account, and hold it as security for the money advanced, as an accommodation to Moreau.

In the admitted testimony, and even in that rejected, there is nothing to contradict the meaning of these letters, which undoubtedly show that, at the request of Moreau, Gumbel & Co. purchased the note and positively declined to pay it for account of Moreau.

The indorsement on the note is as follows: "For value received, I hereby transfer the within note to Ferdinand Gumbel & Co., with

all the rights and interests I have in said note, without recourse against me."

This indorsement added nothing to a simple indorsement, which carries with it all the security of the note.

The testimony which was rejected was introduced to show that the mortgage debtor, the maker of the note, notwithstanding the agreement in the letters, had paid with his own means, through Gumbel & Co., his agents, the three thousand dollars balance due on the note. This testimony would in no way contradict the indorsement, as its transfer to Gumbel & Co. is not at issue. Their right to sue on the note is not questioned. They are by the pleadings recognized as the legal holders of the note. It is certain that if Gumbel & Co. had no funds in their hands at the time they bought the note of the defendant Boyer, they had the right to purchase the same for their own account. And if they purchased the note, and paid the credit indorsed on it out of the funds of their principal, it is to be considered as having made the payment, and the mortgage would be canceled to that amount.

From the indorsement of payments on the note, it appears that Moreau paid only one thousand five hundred dollars and seventy cents on it after the first payment of three hundred dollars, before it went into the hands of Gumbel & Co.

Now, if in the check of Gumbel & Co. to Hernandez, who held the note for collection for Boyer, this one thousand five hundred dollars and seventy cents credit was included, and was paid out of the funds of Moreau in their hands, they could only, of course, buy the note subject to this credit, and would be entitled to share in the proceeds concurrently for the balance due, provided the note was purchased for their own account, and not solely for Moreau as his agent, for whom they advanced the money, and to whom they charged the same in their account.

These facts the defendant Boyer should have had an opportunity of presenting, if they existed as alleged by him.

We have not discussed each exception to testimony noted in the record, as the objections all go to the same purpose, and under our ruling all of the rejected testimony should have been received in evidence.

Boyer, at the sale of the property, was the last and highest bidder. He tendered to the sheriff the costs and the balance due on the

second mortgage note held. The sheriff declined to finally adjudicate the property to him, because of his failure to comply with his bid by paying the entire amount demanded in the writ of seizure and sale, and also because he was ordered in the third opposition of Gumbel & Co. to retain the entire proceeds in his hands for final distribution. The sheriff could not do otherwise than obey the mandate of the court, and the defendant Boyer's speediest remedy was for a rule against the sheriff to adjudicate the property to him and to make him a deed to it.

The relief prayed for by Boyer was denied, and he was ordered to comply with his bid, and in default thereof to again sell the mortgaged property. From this judgment Boyer took a devolutive appeal.

The defendant Moreau has not appealed, and we can not disturb the judgment as to him.

It is therefore ordered, adjudged and decreed that the judgment appealed from, so far as it involves the issues between third opponent and plaintiff Boyer in the executory process, be annulled, avoided and reversed, and it is now ordered that the case may be remanded to be proceeded with according to law.

No. 11,530.

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J. A. BOYER VS. CLIFTON CANNON, SHERIFF.

GUMBEL & CO., INTERVENORS.

A party who has been declared by a judgment of court, as having failed to comply with his bid, and has not suspensively appealed therefrom, is without interest to enjoin the subsequent sale of the property under an order of court made in pursuance of said failure to comply with the terms of the sale.

APPEAL from the Tenth District Court, Parish of Avoyelles.
Coco, J.

Wm. H. Peterman and *Clegg & Thorp* Attorneys for Plaintiff and Appellee:

Fieri facias, unsupported by judgment, will be enjoined at suit of any person whose rights or interests in or upon the property seized may be injuriously affected. C. P. 296; 19 An. 189; 31 An. 134; 30 An. 800; 33 An. 222; 34 An. 89.

One who claims only preference on the proceeds of a legal sale of the property seized is without interest to oppose such injunction.

A party can not intervene in a suit except for the protection of his own rights; and if his demand does not grow out of the principal action and is not specially permitted by law, it must be dismissed. 2 An. 462; 28 An. 241; C. P., Art. 190.

A writ of *fi. fa.* can not issue in a proceeding in which no judgment has been rendered; nor can property be sold under a *fi. fa.* partly for cash and partly upon terms of credit. Arts. 641, 680, 681, C. P.

A writ of *fi. fa.* can be stayed only by injunction. 19 An. 189.

Where the sheriff has advertised and is proceeding to sell property in a manner not in conformity with the decree of the court, his action may be enjoined. 31 An. 134; 30 An. 800; 34 An. 89; 33 An. 222.

Except in a case of trespass on real estate, a claim for damages can not be made in an intervention against one who does not reside in the parish where the principal action is pending.

G. H. Couvillon Attorney for Intervenors, Appellants:

Plaintiff in injunction must prove the allegation of his petition. 19 An. 276.

A mortgagee can not enjoin the sale. If it be null it does not affect his rights; if it is valid his remedy is by third opposition 26 An. 245, James vs. Breau, Sheriff.

An injunction granted on an allegation of ownership to real estate, the plaintiff failing to prove title, the injunction should be dissolved.

An error in the advertisement, which can be rectified by merely calling printer's attention, can not cause irreparable injury. The injunction should be dissolved with damages.

It is the duty of plaintiff in execution to see that the property is properly advertised under his writ.

Plaintiff in execution can no longer control his writ when third persons have acquired rights under it. If he wants to suspend the judgment operating against him his remedy is by appeal.

The opinion of the court was delivered by

McENERY, J. Many of the facts to the proper understanding of this case are stated in the case No. 11,531, of Gumbel & Co. vs. J. A. Boyer *et als.*, just decided. *Ante.*, p. 762.

The defendant in that case took a devolutive appeal. The defendant, Boyer, refusing to comply with his bid, the sheriff, in pursuance to the decree, advertised the property for sale. In doing so, he advertised the property as being sold under a *fi. fa.* instead of a writ of seizure and sale, issued in pursuance of an order of seizure and sale. For this reason the defendant, Boyer, enjoined the sale. Gumbel & Co. intervened; objection was made to their intervention. It was properly overruled, as they had an interest in the sale of the property to realize the amount of the concurrent mortgage note which they held.

There was no personal judgment rendered in this case under which a *fi. fa.* could issue. This is not denied, and it is admitted that the proceeding was irregular, but the defence is that it was the fault of the printer, and that the defendant has shown no irreparable injury, and was not the owner of the property, and had no interest in arresting the sale.

The decree of the District Court was that the defendant, Boyer, had not complied with his bid, and the property was ordered to be again offered for sale. This judgment was not suspensively appealed from, and there was nothing in the way of its execution. Boyer was therefore a stranger to the proceeding under the order of court, and was without interest to arrest the sale of the property. The second order to sell was in effect an interlocutory order carrying into execution a judgment not arrested by a suspensive appeal. Whan vs. Irwin, 27 An. 708; State vs. Judge, 30 An. 229; Boutte vs. Executors of Boutte, 30 An. 177; State *ex rel.* Remington Paper Co., 45 An. 1418; Murphy vs. Murphy, 45 An. 1482.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and the injunction issued herein be dissolved at costs of plaintiff in injunction.

No. 11,525.

STATE OF LOUISIANA VS. BOB ROBINSON.

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On the completion and empaneling of a jury, the jeopardy begins; but it begins only when the panel is full; until full, the jeopardy is not perfect.

Without a complete jury the defendant can not be conducted to the period of his jeopardy; but after the jury, being full and complete, is sworn, and added to the other branch of the court, and all the preliminary things of record are ready for the trial, the defendant has reached the period of jeopardy from the repetition of which the constitutional provision protects him.

APPEAL from the Sixth District Court, Parish of Richland. *Ellis, J.*

M. J. Cunningham, Attorney General, for the State, Appellee:

The trial court is vested with discretion to continue a case if it thinks justice requires it, and it is also a matter resting within its discretion whether, pending the trial, it will delay the proceedings for the purpose of enabling the State or the defendant to bring in additional testimony. State vs. Vigoreux, 3 An. 309.

To entitle a defendant to a plea of *autrefois acquit* it is necessary that the former acquittal be a legal acquittal by judgment upon trial, for substantially the same offence, by the verdict of the jury. State vs. Hornsby, 8 Rob. 583; 1 Bish. Cr. Pl., par. 809.

Robt. Whetstone Attorney for Defendant and Appellant:

A plea of *autrefois acquit* is of a mixed nature, embracing both law and facts, and should be submitted to a jury. 42 An. 414; Wharton Crim. Law, 568; Bishop Crim. Pro. 742, 816.

The State and accused having declared their readiness to go to trial under a valid indictment, trial begun and the jurors sworn and the indictment read, an abandonment or continuation of the case, and a discharge of the jury by the district attorney over defendant's objection, bars a subsequent prosecution for the same offence. Art. 5, Const.

All authorities agree that the jeopardy of an accused does not begin until the jury is fully empaneled and sworn. 43 An. 515; 1 Bishop Crim. Law, Secs. 1014, 1015; 1 Wharton Crim. Law, Sec. 590.

The opinion of the court was delivered by

WATKINS, J. The accused was indicted at the September term, 1893, for the crime of larceny, and he was placed on trial, and a jury were duly empaneled and sworn, and the indictment read.

At this stage of the proceedings the district attorney requested a temporary suspension of the trial for the purpose of preparing an application for a continuance in order to enable him to procure the testimony of an absent witness. This application was granted, the proceedings were temporarily suspended, the motion for continuance was filed, argued and submitted, the case was continued for the term, and the jury empaneled to try the case were discharged—the defendant objecting and retaining a bill of exceptions to the rulings of the judge.

At the February term, 1894, the defendant objected to going to trial, on the ground that he had been once in jeopardy, and was discharged and released from further prosecution, by reason of the continuance of the cause, under the circumstances detailed, and to that end he filed a plea of previous jeopardy.

This motion was overruled and he retained a bill. Over his objection the trial was thereafter proceeded with, he was found guilty, was sentenced to eighteen months' imprisonment in the penitentiary, and from that sentence he prosecutes this appeal.

The question propounded is, whether the accused was put in jeopardy by the empaneling of the jury of trial, and the reading to them of the indictment—no testimony having been adduced—and did the discharge of the jury and the continuance of the case operate his release from further prosecution—the continuance of the case and the discharge of the jury being over the defendant's objection and exception.

It appears, as matter of fact, that the principal witness on behalf of the State had been duly summoned, but was not found by the sheriff, and that certain depositions which had been taken before an examining magistrate and deposited in the clerk's office were missing and could not, after diligent search, be found.

In order to obtain this testimony, the district attorney had requested a continuance of the case, and the judge assigned as the reason for granting it that the application proceeded upon the theory that the State was surprised that a part of the public archives of the clerk's office could not be produced, and that this fact did not evidence want of due diligence on the part of the district attorney in not having previously advised himself of the loss, as that officer had the right to presume the record was in its proper place.

The question of discretion in the judge to grant or disallow the continuance depends, however, on the main question of whether the circumstances related disclosed that the defendant was in jeopardy at the time it was granted; for, if he was, the judge had no discretion in the premises, and if there was no jeopardy, he had.

An examination of the authorities has satisfied us that the defendant's plea is good and should have been maintained.

Mr. Bishop defines jeopardy thus: "If after the jury have been sworn, and thus the jeopardy has begun, the court, contrary to true practice, discharges them without a verdict, this is, in law, equivalent to an acquittal; and, on motion, without plea, the prisoner is entitled to be set at liberty." 1 Bishop's Crim. Prac., Sec. 821.

Again that author says: "When on the completing and swearing of the panel, the jeopardy of the accused begins; *and it begins only when the panel is full;* until full, the jeopardy is not perfect. In other words, without a jury set apart and sworn for the particular case, the individual defendant has not been conducted to his period of jeopardy. But when, according to the better opinion, the jury, being full, is sworn and added to the other branch of the court, and all the preliminary things of record are ready for the trial, the prisoner has reached the period from the repetition of which our constitutional rule protects him." 1 Bishop's Crim. Law, Secs. 1014, 1015.

In support of this proposition many authorities and State decisions are collated, and we have examined all and cite the following, viz.: Wright vs. The State, 7 Indiana, 324; Morgan vs. The State, 13 Ind. 215; McKenzie vs. The State, 26 Ark. 334; Hines vs. The State, 24 Ohio Stat. 134.

In treating of "the essential elements of jeopardy," the following is stated in the American and English Encyclopedia of Law, viz.:

"If there be not a complete panel of jurors, the trial is a nullity, and jeopardy does not attach; and a trial without a jury is void and not a putting in jeopardy.

"The jury is said to be charged with the prisoner when the twelve jurors are duly empaneled and sworn; and when the jury are thus sworn to try the accused on the charge preferred, jeopardy attaches. If it attaches for a moment only, it is sufficient to put the accused within the provision of the Constitution." Vol. II, p. 933, Jeopardy, Sec. 4, pars. 4, 5.

Of the authorities quoted as supporting that theory, we cite the following, viz.: Bell vs. The State, 44 Ala. 393; Grogan vs. The State, 44 Ala. 9; Newson vs. The State, 2 Kelly (Ga.) 60.

But the principle is stated in People vs. Webb, 38 Cal. 467, with more accuracy and elaboration than any other given case, and the opinion of the court is supported by an array of authorities, English and American.

On the foregoing authorities we consider it a settled principle that after a jury has been set apart and sworn for the particular case, the defendant has been conducted to his period of jeopardy, and is entitled to the protection of the constitutional bar, in case the jury be set aside against his objection.

But this rule is not an absolute one, and applicable to all cases alike. There are exceptional cases to which the foregoing principles do not apply; as, for instance, when there is any illegality in the composition of the jury; or a disqualified person is found on the panel; or the jury are known to have been guilty of misconduct; for any of which causes the verdict might be set aside. The rule invoked and applied in this case is that where there is a *completed* jury duly empaneled and sworn to try the issue joined—and to the legality of which no objection is urged—the accused is, at the moment, placed in jeopardy.

But there is no conflict between the principle announced and that stated by the court in State vs. Nash, 46 An. 194, to which we adhere.

For these reasons we are of opinion that the verdict and sentence pronounced against the defendant should be annulled and reversed.

It is therefore ordered and decreed that the sentence and judgment appealed from be annulled and reversed, and it is further ordered and decreed that the plea of previous jeopardy be sustained and the defendant set at liberty.

No. 11,390.

Succession of Elizabeth Bey.

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1. When a will is established to have been made by the testator himself, or by a notary at his instance and dictation, in the presence and hearing of the subscribing witnesses, unaided by others, and its provisions and expressions are sage and judicious, containing nothing sounding to folly, these facts establish a presumption, even in the case of a person habitually insane, that it was made during the existence of a lucid interval, and impose on those who attack the will the burden of proving insanity at the moment when it was made.

2. Death of the testatrix by suicide does not raise a presumption of insanity at date the will was executed. Even when the suicidal act is unquestionably the effect of insanity, it does not necessarily follow that a will prepared within a short time previous is invalid.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Farrar, Jonas & Kruttschnitt Attorneys for Legal Heirs and Administrator, Appellees:

"Where general insanity, even with some intervals, is shown, the burden of showing that the particular act in dispute was made during such an interval is thrown on the party who supports the validity of the act or contract." C. C., Art. 1788, Sec. 9.

"A lucid interval under the civil law is not an apparent tranquillity or a seeming repose. It is not a simple diminution or a remission of the disease, but a temporary cure." Aubert vs. Aubert, 6 An. 108.

The law recognizes two classes of insane persons—one called *furiosos*, the other *mente captos;* the latter class do not enjoy lucid intervals. Aubert vs. Aubert, 6 An. 109.

Melancholia is classed as *mente captos.*

Only in cases of *furiosos*, or where acts of insanity are rare and intermittent, will apparent wisdom of the testament necessitate proof that decedent was sane at moments of its confection. Chandler vs. Barrett, 21 An. 58.

The decision in Kingsbury vs. Whitaker, 32 An. 1057, must be read in the light of the facts therein involved, which explain the expressions therein and give a different effect thereto than when read by itself.

Frank Zengel Attorney for Absent Heirs, Appellees:

A person who is affected with monomania, although sensible and prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not, in law, capable of making a will. Wharton and Stille, 45.

When delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind; to that extent the mind must necessarily be taken to be unsound.

Melancholia is settled and continuous depression of the mental faculties.

C. C., Art. 1474: To make a donation either *inter vivos* or *mortis causa*, one must be of sound mind.

C. C. 400: The interdiction takes place from the day of presenting the petition for the same.

C. C. 401: All acts done by the person interdicted, from the date of the filing of the petition for interdiction until the day when the same is pronounced, are null.

If by facts occurring near the time of the date of the testament and preceding and following it, the heirs have proved an habitual state of insanity, then and notwithstanding the wisdom of the will the onus would be shifted on to the legatee to prove the sanity of the testator during the intermediate time—that is, at the date of the testament. Chandler vs. Barrett, 21 An. 58.

It is incumbent on the party alleging mental unsoundness to show it. If general unsoundness is shown before the making of the will, the burden of proof is then on the proponents to show that the incapacity had ceased at the time of execution. 47 American Decisions, 422.

Where a person's acts for a series of years are different from those governing mankind at large, and differing widely from his former conduct and character; where the change in his intellectual capacity from that of an educated, careful and attentive business man, is to one who is allowed but a trifle of money such as would please a child; whose property and person are entirely in the control of others, brutally exercised and uncomplainingly submitted to; who requires the daily care of his wife to shave him; who at length becomes the inmate of an insane asylum, and thenceforward lives and dies a lunatic. Held, that all these circumstances indicate a clear case of insanity and will invalidate a deed executed under such circumstances. Haviland vs. Hayes, 37 N. Y. 25.

To render a person competent to dispose of his property by will, it is not enough that he be possessed of some degree of intelligence and mind, but he must have sufficient mind to comprehend the nature and effect of the act he is performing, and the relation he holds to the various individuals who may naturally be expected to become objects of his bounty. Wait's Digest of New York Reports, 739.

Where there is conflicting evidence on the question of the mental soundness of the testator, medical testimony has the greatest weight. 4 Wait's Digest, New York, 761.

The expert testimony of medical men is the most important of all, for it requires the most minute, varied and extended knowledge; it frequently relates to subjects of an intricate and recondite character; it is applied to the settlement of questions affecting the three great interests which men most love—namely, life, reputation and property.

The opinion of witnesses, who are not physicians or experts in matters of insanity, touching the condition of the mind of a human being, are entitled to little or no weight as evidence in a trial involving the alleged insanity of a person. Great weight and legal effect will be given to the opinions of physicians and experts. Eloi vs. Eloi, 36 An. 563.

Wills may be avoided, though there has been no interdiction nor notorious insanity and more than thirty days have elapsed between their date and the testator's death; not so with contracts, which are less easily avoided for unsoundness of mind. Testaments are more easily avoided on the ground of unsoundness of mind than contracts. Aubert vs. Aubert, 6 An. 104.

A mortgage made by a notoriously insane person, and who was at the time known by the mortgagee to be imbecile, is null and void, although the mortgagor was not interdicted at the date of the mortgage. Pecel vs. Guinault, 32 An. 94.

Chronic insanity is presumed to continue. State vs. Briyea, 5 Ala. 244; 11 Am. and Eng. Ency. of Law, No. 11, 160.

The burden of proof is upon the one alleging a lucid interval where by common report the vendor was supposed to be insane. Rogers vs. Walker, 6 Pa. Stat. 371.

It should be borne in mind, that when continuous insanity is proved, the burden of proving a lucid interval, during which the instrument is alleged to have been executed, is on the party setting up the instrument.

It is otherwise, however, when the prior insanity alleged was spasmodic and parenthetical, or consisted of delirium tremens. 18 Ill. 282; Menkins vs. Lightner; Ackey vs. Stephens, 8 Ind. 411; State vs. Wellington, 58 Maine, 658.

Dinkelspiel & Hart, Attorneys for Henry Schipman, Testamentary Executor and Appellant:

Sanity or soundness of mind being the natural condition of mind, insanity is never presumed, but must be affirmatively and contradictorily established. 32 An. 1058.

The presumption is always in favor of the act; insanity is never presumed. Chandler vs. Barrett, 21 An. 60.

If a testament presents a series of wise and judicious dispositions, the onus is upon the heirs who attack it to prove unsoundness of mind at the date of its execution. 21 An. 60.

When the will was made by the testator himself, unaided by others, and its provisions and expressions are sage and judicious, containing nothing sounding to folly, "it will be assumed, even in case of a person habitually insane, that it was made in a lucid interval; and the burden of proof will be upon those who attack it to show insanity at the moment when it was made. Kingsbury vs. Whitaker, 32 An. 1057.

The test of the law upon this subject is whether, at the moment of making the will, the testator was of sufficiently sound mind to fully understand the nature of the testamentary act and appreciate its effects. Kingsbury vs. Whitaker, 32 An. 1057.

Suicide committed by the testator soon after making his will is not conclusive evidence of his insanity. 7 Pickering, 94.

The law draws no inference against the sanity of a person from the mere fact of suicide. Duffeld vs. Robeson, 2 Harring, 375.

The opinions of medical men are received upon questions of professional skill, but they should state the facts on which such exceptions are based, and the opinions themselves are not conclusive, but must be weighed as other evidence. Chandler vs. Barrett, 21 An. 58.

The opinion of the court was delivered by

WATKINS, J. The legal and presumptive heirs of the deceased resist the probate of her last will on the ground that she was insane at the time of its execution and incapable of making a legal and valid testament.

The introduction of evidence took a wide range, and at the trial there was judgment in favor of opponents, annulling the will, as

having been made by an insane person; and it decreed that, "by reason of her insanity," the testatrix died intestate.

The testamentary executor propounded the will for probate, and had an inventory taken, but the probate of the will was resisted by the attorney for absent heirs, who had, theretofore, been appointed at the suggestion of the public administrator, who had undertaken the administration of the succession as a vacant estate.

The theory of opponents seems to be that the testatrix was afflicted with that species of insanity known in medical jurisprudence as *melancholia*, the effect of which was to render her incapable of transacting the business affairs of every-day life, and consequently of making a testamentary disposition; and the fact of her having committed suicide shortly subsequent to the execution of the will is referred to and relied upon by opponents as confirmatory proof of her previous insanity. And it is asserted in the brief, as well as in the oral argument of appellant's counsel—without denial from the other side—that the judge below assigned the fact of her suicide as being a weighty if not a conclusive proof of her previous want of capacity to make a will.

Counsel for the appellees make reference to the proceedings which were inaugurated for the interdiction of the deceased shortly previous to the making of her will as a circumstance corroborating her state of confirmed insanity at that time.

To these three facts—or incidents, rather, in the life of the unfortunate young woman—all of the testimony on either side seems to have been directed, other evidence being merely corroborative.

Arranging these three events in the order of their occurrence, we find from the record that the interdiction suit was filed on the 16th of August, 1892, the will was executed on the 18th of November, 1892, and the suicide occurred on or about the 3d of January, 1893.

As it is evident that the test of the sanity of the testatrix at the time of making her will is of the greatest importance—in fact, is the crucial question in the case—the *terms* of the will and the circumstances surrounding its execution must be examined at the outstart, this court having decided that the test of the law is whether, at the moment of making a will, the testator was of sufficiently sound mind to fully understand the nature of the testamentary act, and appreciate its effects. Kingsbury vs. Whitaker, 32 An. 1055.

(a) An examination of the will discloses that it was executed in the presence of F. D. Charbonnet, a notary public, and four witnesses, two of whom were practising lawyers.

It appears from the testimony that on the 18th of November, 1892, during the business hours of the day, the deceased appeared at the notary's office pursuant to a previous agreement to that effect, and that at the time and place agreed upon said notary received her last will and testament, in the presence and hearing of four witnesses, as dictated to him by said testatrix.

A fair synopsis of the testament is as follows, viz.: That the testatrix bequeathed to one of the legatees an improved city lot; to another, a sum of money that was to her credit in a designated homestead association, and a lot of household furniture, etc.; to another, certain shares of stock in the Merchants' Mutual Insurance Company; to another, certain other shares of stock in the same company; to another, certain other shares of stock in the same company; to another, certain other shares of stock in the same company; to another, the family tomb in the Vincent de Paul Cemetery; and to another, the vault in the Odd Fellows' Rest.

It was concluded by appointing an executor without bond, denominating him "her good friend."

The circumstances under which the testament was executed are detailed by the notary and subscribing witnesses.

The notary states that the will was made at his office, during the business hours of the day, and in the immediate presence and hearing of the four witnesses who subscribed their names to the act.

That same was executed by him in pursuance of a previous agreement with the testatrix.

That previous to the execution of the will the deceased had called at his residence to see him, and learning of his absence she left with his wife a message for him to the effect that she desired to see him about making a will. That, accordingly, he visited her, and they had a conversation upon the subject and agreed upon the price.

"She wanted," so the witness states, "the will to be made at her house. I told her what I would charge. She hesitated, and jewed me down. * * * She asked me if I could not do it any cheaper, (naming) a price; and I told her if she wanted it at that price to come to my office, and she came a day or two afterward."

This witness further states that when the deceased came to his

office she stated that it was for the purpose of making her will, and the will "was dictated to (him) by Miss Bey's own lips;" that "she appeared to be in a condition such as any ordinary person would that would come to make a will." That when completed the will was read to her in the presence and hearing of the witnesses, and she seemed to properly understand its provisions and signed it in his presence and in that of the subscribing witnesses. That, after its completion, she handed him the exact amount of the fee agreed on between them some days previously, without any discussion, or suggestion from any one.

During the course of the notary's examination, the following occurred with relation to his visit to the residence of the testatrix, viz.:

"Q. But you afterward went to her house?"

"A. Yes."

"Q. Did she seem to thoroughly understand the object of your visit?"

"A. I asked her if she sent for me, and she said 'yes.'"

"Q. Did she tell you that she wanted a will made?"

"A. Yes."

And with reference to her visit to his office he said:

"Q. If there had been the slightest doubt in your mind as to her sanity would you have made the will?"

"A. No, sir; I would not."

"Q. You have known this lady, how long?"

"A. I have known her a long time. I lived in the neighborhood for some time."

In speaking of the deceased as she appeared on the occasion of his visit to her, and on that of her visit to his office, he says she was well dressed and made a nice appearance.

Again he says, in speaking of what transpired at the time the will was executed, the following occurred, viz:

"Q. Did she have any hesitation in declaring her intentions to make a will before you?"

"A. None at all."

"Did any one help her or aid her in making the disposition?"

"A. No; I would not have written what I did if anybody had."

* * * * * * *

"Did Miss Bey have any paper or memorandum from which she read when dictating the will?"

"A. I never saw any."

* * * * * * *

"Q. When you read (the will) aloud to her and to the witnesses, did she have any paper before her to (enable her) to follow the reading?"

"A. I never noticed any."

The testimony of this witness is entirely supported and confirmed throughout by that of the four subscribing witnesses—they being interrogated and cross-interrogated at length.

The testament, dictated as it was by the testatrix, bears internal evidences of judgment, forethought and careful preparation, as well as accurate knowledge of her property, and the means she possessed at the time of its confection, as well as perfect acquaintance and familiarity with the different persons who are mentioned as legatees. Not only so, but it evidences a sentiment of affectionate interest in, and concern for, the persons she considered her special friends; and she seems to have apportioned her bounty relatively to their nearness to her. And in the dispositions of her will, taken as a whole, she seems to have exercised reasonable care for the mutual interests of all, without making any unreasonable or unusual bequests to any.

The only thing preferred against it is that the testatrix instituted *friends* instead of *collateral* relations as her heirs. But, in the light of the law, she had a recognized right to thus dispose of her property; and her collateral relations resided abroad and were unknown to her—no intimacy, or even acquaintance, seeming to have ever existed between them during her lifetime.

Certainly, this testament possesses no internal evidence of the insanity of the testatrix at the date of its execution; and the circumstances detailed by the notary and subscribing witnesses negative that idea.

With regard to the interdiction proceedings that were instituted in August previous to the making of the will in November, nothing need be said, beyond the fact that they were but the culmination of a sentiment that prevailed in the community in which she lived during some months previous, to the effect that she was insane; and the further fact that they were discontinued, voluntarily, ten days before the will was made by the parties who inaugurated them—without the assignment of any reason or excuse.

Of themselves they can not furnish any evidence of insanity, as they did not result in a judgment of interdiction.

The person in whose name the interdiction suit was brought states that he had known the deceased for a long time, and that during her father's lifetime she was "a very sensible, fine young lady."

He says "she was of good, sound mind before (he) saw her at Mrs. Roper's."

His statement is that her father died in February or March, 1891, and soon afterward she removed to the house of Dr. Keitz, on an invitation of the latter, carrying all of her furniture, clothing and effects.

Another witness states that the deceased was removed from the residence of Dr. Keitz to her own on the 2nd of June, 1892—more than two months previous to the institution of the interdiction suit; and inasmuch as most of the evidence appertaining to her insanity relates to the period of time she resided in Dr. Keitz' house, it is well to look into the circumstances of her arrival at and her departure from his house—a period of something more than one year.

The witness last referred to states that she had known the deceased about seven years previous to her death, and very intimately. That the deceased and her father lived in a tenement adjoining the one which witness and her husband occupied—there being only a partition wall between them. That during the seven years of their acquaintance, the greatest intimacy existed between the two families. That she was present when the testatrix' father died, and she describes the death scene and surroundings graphically. That the deceased remained alone in her father's house about three weeks, when she moved to the house of Dr. Keitz to live. That, in speaking with witness on the subject, she said: "Well, Dr. Keitz says for me to break up housekeeping and go to his house, and I will fall into grand society." That witness replied: "All right, Lizzie. Just as you wish." That the deceased responded: "Well, I am going to try it; it may be better and it may be worse."

Up to this date there is no suggestion of her insanity—the first intimation of it coming from Dr. Keitz in May, after her instalment in his house in March—though it remained *undisclosed until the rumor* had become flagrant in the neighborhood.

About six months later she stated to Mrs. Roper that she wished she had broken her neck before she went to Dr. Keitz' house—

making many serious complaints, and, amongst others, that she had been drugged by the doctor, and affirming "that she had not felt well since Dr. Keitz drugged her with those pellets."

This lady, Mrs. Roper, states that the first she heard of Miss Bey's alleged insanity was through Mrs. Heitzman, in the spring of 1892. That, about that time, Miss Lizzie Bey sent for her to come to see her, and she went; but that she first met Dr. Keitz, who stated that Miss Bey was "going from bad to worse—was losing her mind." That on afterward meeting Miss Bey, she exclaimed: "Oh, Mrs. Roper, Mrs. Roper—I should have broken my neck the day I first put my foot in this house. * * * I have been taking those pellets; I have been taking too much of those morphine pellets."

Soon after this occurrence, the rumor of Miss Bey's insanity was publicly discussed in the vicinity of Dr. Keitz' residence, and it created quite a sensation among the people of her acquaintance. Many persons visited Dr. Keitz' house, for the purpose of seeing the insane girl—without protest or objection on the part of any member of Dr. Keitz' family. On the contrary, these visits were apparently encouraged by them.

A day or two after the occurrence above related, Dr. Keitz called Dr. Castellanos to see Miss Bey professionally, and he held a short interview with her—in the *presence of a number of persons* who seemed to have been attracted there through curiosity—and afterward gave it as his opinion that she was suffering from *melancholia.*

The day following this interview, Mrs. Roper carried Miss Bey to her house to live—said removal being made at the instance of Dr. Keitz' wife.

On the occasion of Miss Bey's removal from the house of Dr. Keitz, he stated to Mrs. Roper that "*if anything happens* to her," that she must let him know—qualifying the observation by the remark that she might die, or that she might have to be strapped down.

All of this occurred in Miss Bey's presence.

Dr. Keitz, as a witness, states that he had been the family physician of Miss Bey's father, and had known her familiarly for several years prior to her coming to his house to live, but that the first symptoms of insanity developed themselves in May, 1891—two months after her coming into his house to live. He speaks of hav-

ing only seen her once after she was removed to Mrs. Roper's, and that was in October, 1892. In speaking of her capacity to make a will he says: "The disease may have abated, but I do not think she was ever after of sound mind."

Notwithstanding the fact that Miss Bey was removed from his house on the 2d of June, 1892, and he had not seen her afterward until October, Dr. Keitz admits that he had *first suggested her interdiction, and that the suit was filed at his request in August.*

Though Dr. Seeman had seen Miss Bey professionally after her removal to Mrs. Roper's, and testified at the commencement of the trial of the interdiction suit that she "had been subject to *fits* of melancholia" for six months previous, yet it is a fact that the interdiction suit was discontinued at his suggestion, mainly, ten days prior to the making of the will and subsequent to the delivery of his testimony therein.

But it does not appear that Dr. Seeman ever made a careful examination of Miss Bey with a view to making a test of her sanity, and hence the conclusion is that his opinion was based upon casual observation.

Dr. Szabary was called and interrogated *by opponents as a medical expert on matters of insanity*, and he testifies that he visited Miss Bey professionally during the time she was at Mrs. Roper's house, and he states that her disease was "*nervous prostration.*"

He states that he visited her twice, and "found no other sickness except emaciation and prostration."

These two visits were made on June 4 and 8, 1892, respectively—that is, immediately after her removal to the residence of Mrs. Roper on the 2d of June.

The doctor states that he questioned her critically as to her condition, and that she answered him simply and satisfactorily—giving no evidences of insanity.

The following interrogations and answers will best discover the true situation, viz.:

"Q. During that entire conversation was there anything which she said that would lead you as a medical man of standing and reputation to think that she was out of her mind?"

"A. No, sir."

"Q. Then, on the other hand, speaking affirmatively as a med-

ical man, was there or was there not sufficient evidence that she was an intelligent person?"

"A. Yes."

"Q. A person of good common sense?"

"A. Yes."

"Q. She spoke to you lucidly and plainly?"

"A. She answered all my questions."

"Q. And answered them sensibly?"

"A. Yes."

* * * * * * *

"Q. Did she have the appearance that would indicate, in the slightest degree, that her mind was disordered or disarranged?"

"A. None whatever."

* * * * * * *

"Q. Are you prepared to say, doctor, that you made an examination of her mental condition and that you are prepared to testify as to its condition at that time?"

"A. Yes."

"Q. As an expert?"

"A. Yes; as the physician in charge of the Insane Asylum, years ago, I can tell you something about it."

* * * * * * *

"Q. If there had been, in your judgment, the slightest indication tending toward insanity in this woman, would you or not have noticed it?"

"A. I would."

"Q. Would it not have come directly under the investigation you were then making?"

"A. Yes."

"Q. Did you notice anything of the kind?"

"A. There was nothing to be noticed tending to show that she was insane."

"Q. From her looks, demeanor and general conduct, was she or not, in your opinion as an expert, capable of attending to her business and attending to the ordinary affairs of life?"

"A. She was."

It is a noteworthy fact that this doctor was first called to see Miss Bey the day *after she had been removed to Mrs. Roper's*, and that Dr.

Castellanos was called to see her the day *previous* to her departure from Dr. Keitz' residence; and while their statements are diametrically opposed to each other in respect to the lady's mental condition, on those two occasions, we are of opinion that the difference is mainly attributable to the *radical change in her situation* and surroundings, occasioned by her removal from Dr. Keitz' to Mrs. Roper's house.

Under the circumstances detailed, we are disposed to attach greater importance to the testimony of Dr. Szabary than to that of either of the other medical experts—owing to his special fitness to testify in reference to insanity, and to his having made a more careful examination of the testatrix, and under more favorable conditions.

Outside of the isolated expressions of opinion by Dr. Seeman —we do not include that of Dr. Keitz—none of the opponents' leading witnesses testified to facts or circumstances which occurred *subsequent* to Dr. Szabary's examination of Miss Bey; though all of the executor's witnesses devote almost exclusive attention to such subsequent facts and circumstances. These witnesses state that they had known the deceased for ten or twenty years, and they concur in the opinion that she was not insane, while admitting that she did evince some idiosyncrasies while she resided at Dr. Keitz' house. All of them join in the statement that she was generally right-minded and sensible while she lived with Mrs. Roper, and was at all times capable of attending to her own affairs; and it is in proof that she did attend to the payment of her taxes, the collection of her rents and the management of her investments. And it is also in proof that on the day the interdiction suit was fixed for trial she was present at the wedding ceremony of Mrs. Roper's son, and participated in the wedding feast. Even Dr. Keitz admitted that Miss Bey had given him promissory notes in liquidation of her board while at his house.

A careful examination of the evidence, embracing the dates above given, has satisfied us that Miss Bey was at the moment of making her will, of sufficiently sound mind to fully understand the nature of the testamentary act and appreciate its effect; whether the will was made during the existence of a lucid interval, or by a person of absolutely sane mind, it is comparatively unimportant to inquire.

The theory of the medical experts favoring the insanity of the testatrix is that she was afflicted with *melancholia*, which is in its nature incurable, and not susceptible of lucid intervals.

Such is the opinion of authors on medical jurisprudence, and it was likewise a precept of Justinian, which has been recognized in the jurisprudence of this court. Aubert vs. Aubert, 6 An. 104.

But, it is our opinion—accepting this theory—that the evidence does not make a case against the testatrix of *melancholia;* but, conceding for the argument, that the evidence *tends* in that direction, the clear and indisputable proof of the will having been made at a time when the testatrix was perfectly rational and apparently sane, contradicts it, and renders it an unacceptable theory, or proves her sanity altogether.

Our code recognizes the validity of a will made by an insane person during the existence of a lucid interval. R. C. C. 1788, No. 9.

The rule in reference to the power and strength of mind necessary to make a will is well stated in Chandler vs. Chandler, 21 An. 58, thus: "So far as the latter is concerned"—the amount of intellect required in a testator—"a will may well be made by any mind which has the soundness and strength necessary to endure the conflict involved in the making of a bargain. It would be unreasonable to require that a testator should have more mental vigor and a more lucid memory than a person who makes a contract."

The court states the French jurisprudence to be the same as our own, or rather, that our jurisprudence has followed the treatises of the French commentators—the rule being that if the testament present a series of wise and judicious dispositions, it is for the heirs who attack it to prove the unsoundness of mind at the date of the testament; if, on the contrary, it contains dispositions such as would cause insanity to be presumed, it is for the legatee to prove the sanity of the testator, as against the terms of the testament. Coin Delisle, Don. and Test., p. 82.

The legal presumption is always in favor of the sanity of the testator. Droit Civil, Vol. 3, p. 44; Marcadé, Vol. 3, p. 403; Duranton, Vol. 8, p. 167.

The presumption of sanity does not cease because the testator has experienced some transitory intellectual derangement at a time anterior to the testament. Troplong, Don. and Test., Vol. 2, p. 56.

The English jurisprudence is the same. Chambers vs. The Queen's Proctor, 2 Curtiss, 415; Ray's Medical Jurisprudence, 272; 1 Jarneau on Wills, p. 72; Fullick vs. Allison, 3 Hazzard, 527; Halley vs. Web-

ster, 21 Maine, 461; Clark vs. Fisher, 1 Paige, 174; Johnson vs. Van Dusen, 5 Johnson, 144.

In the instant case the circumstances that are recited and relied upon as indicating the mental unsoundness of the testatrix are not nearly so strong or so convincing as are those recited in the Chandler case; while those surrounding the testatrix at the time of making the will are very much the same.

The opinion in the Chandler case is thus concluded: "If the acts of insanity are rare, and occur at periods distant from each other, and from the date of the testament, the testament if not destitute of good sense, and betraying no folly on its face, will sustain itself (and) be presumed to have been the offspring of a healthy volition and a lucid memory."

The will under consideration fulfils all of those requisites completely. The proven acts of folly occurred some months previous to the execution of the will. The will is sensible throughout, and was by the testatrix dictated to the notary, without any memorandum or suggestion from any one, and betrays no folly on its face.

The extrinsic evidence of the insanity of Bowditch, on which the court decided the case of Kingsbury vs. Whitaker, 32 An. 1057, was, in our opinion, much stronger than it is in this case against Miss Bey, and yet the judgment annulling the will of Bowditch was reversed, notwithstanding three of the most distinguished physicians of the city of New Orleans testified that the testator was insane, and the Boston physician testified in the same tenor, and Bowditch had been regularly interdicted by a judgment of court and he was incarcerated in the asylum.

The court said:

"When physicians tell us that Bowditch must have been insane on the 24th of June, 1876 (the date on which the will was executed), we turn to the will, written entirely by himself as shown by the testimony of two witnesses of unimpeached character and veracity who saw and conversed with him on that day and at that moment, to whom he spoke very rationally of his will, we must conclude that the physicians were mistaken," etc.

The will of Miss Bey contains more convincing proof of her sanity, and the notary and four subscribing witnesses testify, most circumstantially, to its dictation by her in a manner clearly indicative of her sanity.

In the Kingsbury case the rule of interpretation, as formulated from the consensus of opinion on the subject, is thus stated:

"The real question is, whether the brain, or other physical organ, whatever it may be, which is the medium through which the action of the mind is manifested, is so diseased or impaired as to make it an untrustworthy vehicle for the conveyance of the true wish, or will of the testator, unbiased by any delusion which may be the result of disease. The law fixes the time for the application of this test, at the moment when the will is made, and expressly recognizes the capacity of persons, subject at times even to complete *dementia*, to make a will in lucid intervals. When the will is established to have been made by the testator himself, *unaided by others*, and when its provisions and expressions are sage and judicious, 'containing nothing sounding to folly,' these facts establish a presumption, *even in the case of a person habitually insane*, that it was made during the existence of a lucid interval, and imposes on those who attack the will the burden of proving insanity at the moment when it was made."

This rule is more accurately stated than the one formulated in the Chandler case, and we prefer to follow it; but the will of Miss Bey sustains all the requirements of this rule, as well as of the former—for, in our view, her will is good and valid, whether it is interpreted by *intrinsic* or *extrinsic* evidence.

But, if we go further and look into the evidence surrounding the suicide of the testatrix, it is impossible to conclude that—even if she were confessedly insane at the time—it evidenced her *previous* insanity at the time of making her will.

The following is the full text of the letter that was found on the person of the deceased after her death, viz.:

"NEW ORLEANS, Jan. 3, 1893.

"DEAR FRIENDS—I wish to inform you that I am tired of living so concluded to take my life. Dr. Keitz and Dr. Castellanos said that I was insane and going from bad to worst, and that I would not live longer than two or three days after they took me out of his house to Mrs. Roper's, they would have to strap me down; it is going on to eight months and have not been strapped yet, and am no more insane than he is.

"When dead I ask of Dr. Seeman, the coroner, to examine my brain and let the public know what he said about me. I am not

sick, and not well; I do not know what ails me; he must have drugged or got some one to harm me, for it is not natural what I have; I can not live any longer, for I am in misery and can not help myself. *I have my will made some months ago to my friends with the exception of ten shares of stock of the Mutual Ins. Co., to pay my funeral expenses, by my adopted brother Henry Schipman, who is my testator, if there is any left to keep it and give Margaret fifty dollars.* It is hard for me to take my own life, but I hope God and my friends will forgive me, for I could not live longer, there is not another person in this city that is like I am, the party who did that to me I hope will have no luck and follow me soon. When my body is found let Mrs. Roper be notified, and let Mr. Dupresses, the undertaker, bury me. *Mrs. Roper's address is 675 North Rampart street.*

"Yours truly,

"ELIZABETH BEY."

This letter evidences care and thought, and it corresponds throughout with the whole pitiful story that is detailed by other witnesses. It evinces an exact memory of former transactions, especially the occurrences of the 2d of June, 1892, when, in the presence of a number of persons, she was examined by Dr. Castellanos; and of the 3d of June, when she was removed to Mrs. Roper's house. Its reference to her will is quite significant, indeed, and the exactness of her recollection as to the reservation of certain shares of insurance stock for the purpose of defraying the expenses of her funeral is even more remarkable for its tenacity.

Instead of this letter, dated on January 3, 1893, proving her insanity, it furnishes additional evidence of the sanity of the deceased.

Dr. Ray makes the following observations on the question of the suicide of a testator, as affecting the validity of his will, on the theory that suicide raised a presumption of insanity:

"At present," says that author, "the fact of suicide has no other importance than what it derives from its connection with the mental derangement which must be supposed to have given rise to it. Courts would very justly refuse to consider it as *sufficient proof of insanity*, in the absence of other proofs, because it might have been the act of a rational mind, and because, too, if it really had sprung from insanity, the delusion had been so circumscribed as not to have

prevented the judgment in regard to testamentary dispositions and other civil acts.

"The principle adopted in the ecclesiastical courts is, that in cases of *doubtful sanity*—amongst which those of suicide must always be ranged—the validity of the individual's testament must be determined *solely by the character of the instrument itself*. (Our italics.)

"Here is a difficulty that courts will never be very anxious to encounter, and that is to determine *the exact connection of suicide with insanity*—in point of time—supposing the latter to be admitted. When this act is the *only* proof we have of mental derangement we are left without the means of ascertaining where this connection began to exist or to disappear; and, consequently nothing can be more difficult than to decide within what time, either before or after the suicidal attempt, the individual can be pronounced insane. *It not uncommonly happens that a person kills himself*, or *makes the attempt, shortly after making his will*, when the question requires judicial decision whether or not the insanity which led to the fatal act existed at the time of making the will. The practice has usually been, if there were no other evidence of unsound mind, either in his conduct, in his conversation, or in the testamentary dispositions themselves, not to impeach the testator's sanity.

"In a certain case, it was said by Sir John Nicholl that when there was no evidence of insanity at the time of giving instructions for a will, the commission of suicide three days afterward did not invalidate the will by raising an inference of previous derangement." Burrows vs. Burrows, 1 Haggard, 109; Ray's Med. Jurisprudence of Insanity, Sec. 460.

"Chief Justice Parker also held that suicide committed fifteen days after the date of the person's will was not sufficient *in the absence of other evidence* to prove him insane and thus invalidate the will on account of the difficulty just mentioned." Brooks vs. Barrett, 7 Pickering (Mass.), 94.

"Similar views prevailed in Duffield vs. Robson, 2 Harrington, 583, and in Chambers vs. Proctor, 2 Curtiss, 415. In both of those cases suicide occurred the next day after the execution of the will; and in the latter, delusions were proved to exist on the three (days) next previous to the will." Ray's Medical Jurisprudence of Insanity, p. 448, Sec. 460.

In the Brooks case, the court maintained the principle that "if

the evidence be doubtful, the presumption of the law in favor of sanity is to have its effect."

Dr. Ray lays down the general proposition that "even when the suicidal act is *unquestionably the effect of insanity* it does not necessarily follow that a will prepared within a short time of it is invalid" —that is to say, if the will be reasonable. Ray's Medical Jurisprudence of Insanity, p. 449, Sec. 461.

"If the will be a rational act, rationally done, a suicidal act, or attempt, ought not to invalidate it, because the presumption is either that the will was made before the mind became impaired, or that the derangement was of a kind that did not prevent the judgment from using ordinary discretion in the final disposition of property." *Id.*, p. 450, Sec. 462.

Other authorities and text-writers might be cited with advantage, but we prefer to rest our conclusions on this branch of the case upon the opinion of Dr. Ray, on account of his exceptionally concise and correct conclusions of law, as well as on account of this court having in other cases cited his works with approval.

On this branch of the subject, as on the one previously argued, our conclusion is clear to the effect that, even conceding, for the argument, that Miss Bey was insane on the 3d of January, 1893, when she penned the letter that was afterward found on her person, after her death by suicide, there is nothing to show *any causal connection* between the act of suicide and the circumstances surrounding the execution of her last will.

Altogether, our conclusion is that on the 18th day of November, 1892, when Elizabeth Bey executed her will, she was of sufficiently sound mind to fully understand the nature of the testamentary act she executed, and appreciated its effects; and that, consequently, her will is good and valid.

Hence the judgment appealed from must be annulled and reversed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled and reversed; and it is now ordered and decreed that the will of Elizabeth Bey, which was executed on the 18th of November, 1892, be declared legal and valid, and entitled to probate and registry. And it is further ordered and decreed that the aforesaid last will and testament of Elizabeth Bey, deceased, be and the same is ordered to be probated, registered and executed; and that opponents pay all costs of both courts.

No. 11,386.

46 793
49 1297

REMINGTON PAPER COMPANY VS. JOHN W. WATSON ET AL.

If the propositions of law be as they are stated in the plaintiff's petition, and the facts are to be treated and considered as they are alleged therein, the defendant's exception of no cause of action ought not to be maintained—the authority of the appointed receiver who contests the plaintiff's seizure, both in law and fact, being repudiated and disavowed; and also alleged to have been obtained by collusion, for the purpose of defrauding creditors.

APPEAL from the Civil District Court, Parish of Orleans.
Ellis, J.

Merrick & Merrick for Plaintiff and Appellant:

A mere *ex parte* order appointing a receiver to an existing corporation, against which no process is either prayed for or served, and no affidavit, proof or evidence offered, is absolutely null and void. Third persons are not bound by such orders, especially when not complied with. Ober *et al.* vs. Manufacturing Co., 44 An. 570, 571, 573 and 574; State *ex rel.* Britton vs. City, 43 An. 832; Martin vs. Blanchin, 16 An. 238; Frazier, Receiver, vs. Wilcox, 4 Rob. 523, 525; 24 An. 348, 399.

"There can be no greater nullity than a judgment without parties defendants." Labauve vs. Slack, 31 An. 141, top of page.

The term "receiver" has no settled or definite meaning in our law, like sheriff, judicial sequestrator, administrator, tutor or the like, or receiver in chancery, where his functions are explained in many volumes. The Louisiana receiver is but an agent of the parties. 2 Rob. 151, 154; 4 Rob. 517; 12 An. 299, top of page.

It is only to defunct corporations that his duties assimilate a chancery receiver. 44 An. 570.

No judge has been entrusted with the dangerous power by an *ex parte* order to transfer the right of possession or property from an existing corporation to third persons.

Nor to forfeit the charter of such corporation, nor to screen such property from the pursuit of creditors. The richest corporation would be unsafe with such power in any man's hand.

It is the right of every one receiving injury from such illegal proceedings to have them declared null. The State courts are as

much bound to redress wrongs to constitutional rights as they are injuries to any other rights. R. C. C. 2315; 8 Rob. 428; 12 Rob. 20; 42 An. 194; 9 Rob. 191.

Henry L. Garland, Jr., Attorney for Appellees:

The issues on appeal will be restricted to those raised in the judgment appealed from.

Collateral issues raised or decided in other judgments, from which no appeal is taken, will not be considered. Thus, where an order appointing a receiver is rendered, to which consent is given by the plaintiff in the suit, by the defendant corporation, by the State through the Attorney General, and by a large majority of stockholders, and where no stockholder dissents, and where subsequently a mere creditor, not a stockholder, files an action for damages against the receiver and others to which is tacked on a demand for the rescinding of the order appointing the receiver (from which no appeal is taken), the validity of the order appointing the receiver will not be considered on an appeal taken solely from the judgment dismissing the suit for damages and for nullity of the judgment appointing the receiver. Appellate issues are confined to the judgment appealed. 34 An. 3; 34 An. 1025, 1236; 35 An. 555, 1178; 31 An. 436, 521, 741; 33 An. 1404; 30 An. 1255; 14 An. 49; 41 An. 465, 904; 42 An. 77, 346; 35 An. 318; 17 An. 126, 714.

An action of nullity of judgment will not lie where such nullity, if it exists, may be declared on appeal. 3 An. 646; 22 An. 371; 14 An. 666; 27 An. 36; 6 An. 799; 9 An. 203; 23 An. 146.

Where a court of competent jurisdiction appoints a receiver, his acts as such are valid pending his appointment, and will not subject him personally to an action of damages at the suit of an alleged creditor of the corporation.

Where a receiver is appointed to a corporation by a court of competent jurisdiction at the suit of a creditor; in which the State and a large majority of the stockholders intervene and pray for the confirmation of such appointment, and where the corporation itself through its president and board of directors consents to such appointment, the order appointing the receiver can not be annulled at the suit of a single dissenting creditor.

In proper cases, where a great emergency exists, courts have power to appoint *ex parte* receivers to corporations whose property is abandoned and in a danger of ruin, unless immediately protected. The *ex parte* nature of the decree might possibly be complained of by the corporation or stoccholders—but certainly not by a mere creditor.

A creditor has no interest to resist the forfeiture of the charter of a corporation or demand that it continue in business. His interest is in its property. Where his suit is not predicated on any allegation of waste, ruin or erroneous charges by reason of the receivership, the judgment dismissing it as disclosing no cause of action will be affirmed.

The opinion of the court was delivered by

WATKINS, J. This is an action of nullity, accompanied with a demand for damages, which was, upon the exceptions of the defendants, dismissed, because it stated no cause of action, and from this judgment of dismissal the plaintiff has appealed.

Whether a petition has, or not, stated a cause of action must be ascertained and determined from examination and analysis of the petition itself, and the test is, whether if all the allegations be taken as true—for the purposes of the exception—the petitioner would be entitled to judgment.

The substantial averments of plaintiff's petition are:

That it—the Remington Paper Company—is a corporation created under the laws of New York, and having a just claim against the Lonisiana Printing and Publishing Company, Limited, amounting to three thousand eight hundred and sixty dollars and fifty-five cents, for paper furnished said company, and *on* such paper as remained on hand; and having a vendor's lien and privilege thereon, it has a right to sue in the United States Circuit Court and obtain writs of sequestration and attachment against the property and assets of said company.

That, in pursuance of said claim and right, said Remington Paper Company did file suit in the United States Circuit Court, on the 29th of May, 1893, and, under writs of sequestration and attachment therein issued, caused said property to be sequestered and attached —said property consisting of printing press, safe and other articles

of furniture, etc.—and to be taken into custody by the marshal of the United States.

That service of said suit was made on J. D. Hill, president of the defendant company, on the date of the filing thereof, and that, under the Constitution and laws of the United States, petitioner is entitled to prosecute said suit to effect without let or hindrance on the part of any person.

That, "nevertheless, John W. Watson, now made defendant in this suit, in violation of said petitioner's rights, falsely styling himself a receiver of the said printing and publishing company, and falsely stating that he was in possession of said property attached and sequestered, in virtue of an appointment as such receiver * * * filed on the 30th of May last (1893), in said Circuit Court, a motion to have the said attachment and sequestration set aside; and said motion coming on for trial, the said Circuit Court, without passing on the force of the proceedings (of the Civil District Court) on the 6th day of May, ordered that the marshal restore the property seized in (said) cause, under the writs of attachment and sequestration (to) said John W. Watson, receiver, unless within five days the plaintiff appiies for and ultimately receives authority from the Civil District Court, which appointed Watson, or from the appellate court, to hold same under said writ."

That the aforesaid order will have the effect of preventing his obtaining a judgment against said defendant, as there is no mode of revising said order until final judgment can be rendered in said cause without occasioning petitioner great loss and injury, say in the sum of three thousand eight hundred and sixty-three dollars and fifty-five cents, and endangering the loss of its said debt of three thousand eight hundred and sixty-three dollars and fifty-five cents, for which amount petitioner alleges the defendant, Watson, liable.

That said Watson was without any legal right to stand in the way of the collection of its just claim against the defendant for the following reasons, viz.:

1. That at the date of its seizure aforesaid he had not given bond, "nor had he complied with the order of court in the said *ex parte* proceedings; nor had such proceedings been had as to perfect said order, or to give said Watson any right to control the property of said defendant, or to prevent any suit from being brought, or any court from subjecting the property of said defendant by due course of law to the payment of its debts."

2. That "the conduct of said Watson, Frank H. Pope, and those confederating with them, in attempting to screen the property from payment of debts, was collusive and a constructive fraud upon petitioner, and a violation of its rights under the laws and Constitution of the United States."

3. That "the said pretended order under which said John W. Watson claims pretended authority, dated 17th of May, 1893, was absolutely null and void as against petitioner, and the creditors of the said Louisiana Printing and Publishing Company, Limited, and conferred no authority on Watson, for the reason that the same was made upon the collusive petition of Frank H. Pope without citation to any one; without oath or affidavit, or any proof, and without any *contestatio litis;* and that the said inchoate and pretended order on said Pope's petition was obtained (on) the same day said Pope's collusive petition was filed, and in which no citation was prayed for."

4. That "the officers of the Louisiana Printing and Publishing Company, Limited, were incapable by the law of withdrawing from their offices, so as to delay or hinder the creditors of said corporation from the pursuit of creditors; and the said corporation does not cease to exist until regular proceedings have been taken against the numerous officers and stockholders of said corporation, or otherwise, under its charter."

5. That "the attempt to bolster up the illegal and *ex parte* proceedings by so-called interventions on the part of the Attorney General will not cure the nullity of said *ex parte* proceeding of said Pope and said Watson; and, moreover, said so-called intervention, which contains no affirmative allegations on behalf of the State, but purports to recite Pope's allegations, is not a mode of proceeding authorized by law, and the State is without right to intrude itself in this manner into controversies of private persons and to demand forfeitures in any other manner than that provided by law; and the Attorney General was without authority to join said Pope in his prayer in said *ex parte* petition * * and pray that a receiver be appointed; and said *ex parte* proceeding is null and void as against creditors not parties in pursuit of their rights."

In conformity to the preceding averments petitioner prayed, amongst other things, "that said *ex parte* order purporting to appoint said John W. Watson receiver be declared, as against your

petitioner, null and void and of no effect, and that same is ineffectual as a bar to said attachment and sequestration, or other proceedings on the part of petitioners in the said court of the United States; and that said John W. Watson and said Frank H. Pope be condemned *in solido*, or otherwise to pay your petitioner the sum of three thousand eight hundred and sixty-three dollars and fifty-five cents damages caused by their illegal interference with petitioner's proceedings" as above recited.

It is not readily perceived on what theory the defendant's plea of no cause of action rests, or on what theory the judge *a quo* maintained said exception and dismissed the plaintiff's suit.

It is evident that this suit has for object the removal of the receiver, so as to leave the course of proceedings in the United States Circuit Court untrammeled and free; and if, in point of law and fact, his petition be taken as true, he is undoubtedly entitled to judgment.

The opinion of the district judge—as is usually the case with his opinions—is forcibly and carefully stated, though it bears with more direct reference upon the merits of the cause than upon the exception.

We can not anticipate what will be the opinion of this court on the various abstruse and difficult propositions of law propounded in plaintiff's petition; nor can we possibly divine what will be the character, or the degree of sufficiency of the evidence the plaintiff may bring to the support of its representations of fact; but if the law be as the plaintiff asserts it to be, and the facts are to be treated and considered as stated, it is difficult to resist the conclusion that the plaintiff is entitled to judgment.

The judgment appealed from must be reversed. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the exception of no cause of action be overruled, and the cause be reinstated and remanded to the lower court for trial, at the cost of defendants and appellees, in both courts—*quoad* said exceptions.

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No. 11,508.

STATE OF LOUISIANA VS. LUCIUS BARKER.

Two of the jurors drawn for the term deposed on their *voir dire* that they would not convict on circumstantial evidence.

They were properly ordered to stand aside.

The trial judge committed no error in excluding jurors from the panel who are unwilling to convict on legal evidence.

The trial judge ruled that the evidence did not prove that the deceased made a hostile demonstration against the accused.

The required foundation not having been laid, proof of communicated threats by the deceased against the accused was not admissible to rebut malice and reduce the grade of the offence.

McNeely, 34 An. 1022, and the Cooper case, 32 An. 1085, cited as in point, were dependent upon particular facts and circumstances not involved in this case.

Questions of law previously passed upon were reiterated in the motion for a new trial.

The questions of law were decided.

Those purely of facts are not reviewable on appeal.

APPEAL from the Eleventh Judicial District Court, Parish of St. Landry. *Perrault, J.*

M. J. Cunningham, Attorney General, *E. B. Dubuisson*, District Attorney, for the State, Appellee:

Where there is no proof of any overt act or hostile demonstration of the deceased upon the slayer at the time of the killing, evidence of prior threats is irrelevant and inadmissible. 45 An. 846; 44 An. 950; 43 An. 840; 42 An. 753; 39 An. 817; 38 An. 22; 37 An. 443, 489, 644, 782, 896; 33 An. 1087; 30 An. 340; 6 An. 422; Bishop's Crim. Procedure, 1st Ed., Vol. 2, Sec. 617; Bishop's Crim. Procedure, 3d Ed., Vol. 2, Secs. 619 and 620; Wharton's Crim. Evidence, 8th Ed., Secs. 68 and 757.

The overruling of a motion for a new trial will not be considered on appeal when the grounds of the motion are that the verdict is contrary to the law and the evidence, or when no question of law is presented for determination.

In passing sentence in cases not capital, it is not a necessary formality to ask the prisoner if he has anything to say why sentence should not be passed upon him. Bishop's Crim. Proceedings, 3d Ed., Vol. 1, Sec. 1293; Wharton's Crim. Pleadings and Practice, 9th Ed., Sec. 906; State vs. Shields, 33 An. 991; State vs. Atkins, 33 An. 1253; State vs. Taylor, 27 An. 393; State vs. Bradley, 30 An. 326.

Even in cases where it is necessary its omission does not entail a new trial, but simply remands it for proper sentence. *Idem.*

A juror who positively asserts that he will not convict on circumstantial evidence is not competent.

Should the judge err in maintaining the challenge of a juror for cause by the prosecution, this of itself will not afford defendant who has not exhausted his peremptory challenges a legal ground of complaint. State vs Lewis, 41 An. 590; State vs. Creach, 38 An. 480, and authorities quoted.

John N. Ogden and *R. Lee Garland* Attorneys for Defendant and Appellant:

This court, in the case of the State vs. McNeely, 34 An. 1022, has laid down as a principle of law, that where the State has shown particular actions and declarations of the accused for the purpose of establishing malice, the accused will be permitted to prove the dangerous character of the deceased in connection with previous threats made by him against the accused, to "rebut the presumption of malice and to mitigate the offence charged."

In 32 An. 1084, State vs. Cooper, it is held that "had the evidence (prior threats) been offered by the defendant to rebut the presumption of malice sought to be established by the State, by proof of the previous difficulty, inasmuch as such proof had been made by the State for that avowed purpose, it would certainly have been competent for the defendant to have shown the particulars of that difficulty, with a view of showing his justification and his freedom from malice."

Defendant complains that in these proceedings, wherein the indictment was for a capital offence, he, the prisoner, when sentenced, was not asked whether he had anything to say why the sentence should not be pronounced. 33 An. 1255.

The opinion of the court was delivered by

BREAUX, J. The accused was indicted for murder.

From a sentence of the court based on a verdict of a jury convicting him of the crime charged, without capital punishment, he has taken this appeal.

He complains of error in the rulings of the trial judge.

ORDERING TWO OF THE JURORS TO STAND ASIDE.

The first bill of exceptions contains the recital that, while empaneling the jury two of the regular jurors were ordered by the

court to stand aside, because they stated when examined on their *voir dire* that they would not convict on circumstantial evidence; "that almost immediately after they were told to stand aside, and before they had left the court house, the accused through his counsel announced to the court that circumstantial evidence would cut no figure in the case, as accused admitted the killing and pleaded justification, and requested as of right that said two jurors be called back and pronounced competent."

The following are the grounds of refusal forming part of the bill of exceptions:

"1. Because a juror who will not convict on circumstantial evidence in a capital case is incompetent.

"2. Because no injury resulted to defendant in consequence of the juror being ordered to stand aside, his right being one of rejection and not one of selection.

"3. Because the discretion vested in the court in such matters is not reviewable in the absence of injustice."

The court's ruling in ordering these jurors to stand aside had something about it of the final.

Large discretion is necessarily entrusted to the trial judge in selecting jurors.

In entering the order discharging the jurors from service on the panel in this case there was no violation of law.

The number to select from was not thereby illegally reduced.

"It is a settled rule of practice that some prejudice to the appellant, resulting from the rulings of the trial court in organizing the jury, or at least some infringement of statutory provisions relating thereto, must be shown before an appellate court will review the proceedings of the court below." Thompson and Merriam on Juries, p. 297.

No prejudice to the appellant is shown.

The trial court commits no error in excluding a juror on his *voir dire* who is unwilling to be governed by the rules of evidence adopted for the proper trial of cases and the maintenance of public justice.

There are very few cases in which all the evidence is purely positive.

There should be a verdict of conviction wherever there is legal evidence establishing the guilt of the accused.

Circumstantial evidence is legal evidence, and a juror subjects himself to a discharge who will not convict on legal evidence.

OVERT ACT AND COMMUNICATED THREATS.

The second bill of exceptions was taken to the court's ruling on the following state of facts.

During the progress of the trial a witness testified that at the moment of the difficulty he saw the deceased make a motion as if to draw a pistol on the accused.

The accused, through counsel, sought to sustain the credibility of his testimony by the evidence of a number of highly reputable witnesses of the neighborhood, who testified that his character for truth and veracity is good.

A co-defendant of the accused and the accused himself testified that they saw the witness motion as if to draw a pistol.

The accused also sought to sustain his credibility as a witness by evidence of good character for truth testified to by a number of witnesses of standing in the community.

This evidence was followed by the offer to prove that a short time before the homicide threats had been made by the deceased against the accused, and that these threats had been communicated to the accused.

The contention on the part of the defence was that the overt act had been proved; that the testimony of communicated threats was admissible to rebut the presumption of malice charged, and to reduce the grade of homicide.

The trial judge excluded the testimony:

"Because in the opinion of the court it was proved beyond a reasonable doubt (by a preponderance of evidence) that the deceased made no hostile demonstration or overt act toward the accused at the moment of the shooting, the evidence showing that the accused fired on the deceased, striking him in the back, whilst deceased was in conflict with the brother of the accused, being on the ground and the deceased holding him down."

The testimony of the witnesses is not before us. We have, for the purpose of the ruling, the statements forming part of the bills of exceptions. They are direct and positive that there was no overt act by the deceased against the accused. That method of bringing up the proof for review has been followed in a number of cases, and

in the absence of testimony showing error on the part of the trial judge it has been repeatedly held that his findings of the facts, in this respect, shall be taken as true. The questions are of fact and law. The point of law can arise for review only after all the facts upon which it is dependent have been submitted for our decision.

Whenever the facts are incomplete, of the overt act, under well established jurisprudence, we must give weight to the summary or conclusions of the trial judge.

In the case at bar, the accused urges that his testimony, that of a bystander during the difficulty, and of his co-defendant is more than an equivalent to the statement of the trial judge, based on the testimony of a number of witnesses who were also present at the difficulty.

Until a feasible method is devised to bring up for review on appeal all the testimony, that in behalf of the accused to prove, and that of the State to disprove, the overt act, this court must follow the well established precedent.

The principle was stated in the case of the State vs. Harris, 45 An. 842.

In the case of State vs. Christian, 44 An. 954, the doctrine announced previously in a number of cases was reaffirmed "wherein it is declared that whether or not a proper foundation has been laid for the introduction of evidence of the dangerous character of the deceased is a matter to be decided by the trial court, where ruling in such matters will not be reversed unless manifestly erroneous."

In State vs. Wilson, 43 An. 841, the same principle is announced.

In State vs. Cosgrove, 42 An. 754, the trial judge stated that "the only overt act proved against deceased at or about the time of the killing consisted in his having shaken his finger. This statement does not disclose any overt act on the part of the deceased as, taken in connection with the prior threats, justified the defendant in believing that the deceased was then and there about to carry the threats into execution, and that his life was in such apparently imminent danger as to justify him in taking his adversary's."

To the same effect is State vs. Brooks, 39 An. 821.

In State vs. Spell, 38 An. 22, the following emphatic language is employed: "We will not do the injuryto the district judges of the

State of supposing, with counsel for the accused, that any one of them can be found, so devoid of all sense of duty as to secure conviction of an accused by designedly excluding testimony which might be favorable to him. If there be such a judge, his case should be dealt with in other proceeding, for which the Constitution has made ample provision. * * * The rule laid down in the Ford case was not without precedent, and it has been subsequently followed by this court." Citing State vs. Labuzan, 37 An. 490; State vs. Janvier, 11 An. 644.

The court in all those cases held that the question was within the discretion of the trial judge.

In State vs. Kerwin, 37 An. 784, the court says, when passing upon the point: "The ruling of the judge was not arbitrary, but was the exercise of a sound legal discretion, based upon a careful review of the whole evidence, and when that is the case we are bound to take his ruling as conclusive."

In State vs. Jackson, 33 An. 1087, the court confined the consideration of the dangerous character of the deceased as a ground of defence to the facts as stated in the bills of exception.

In passing from this point we desire to state that conclusions and statements will not prevail against testimony in behalf of the defendant showing inconsiderate ruling.

The purport of and extracts from the testimony of the witnesses relied upon as justifying a conclusion or statement should be incorporated by the trial judge in the bill of exceptions.

TO REDUCE THE GRADE OF THE HOMICIDE.

If not admissible to show that the defendant had reason to believe that he was in imminent danger of bodily harm and that a hostile demonstration on the part of the deceased justified him in the killing, the counsel for the defendant argues that it was admissible to rebut the presumption of malice sought to be proved against his client, in order to reduce the grade of the homicide.

Having concluded that the testimony was not admissible to justify the killing, as contended, we will consider the next proposition—that relating to reducing the crime charged from murder to manslaughter. As an independent proposition, the accused can not under the law, in order to rebut the presumption of malice and to mitigate the offence charged, be permitted to introduce evidence over a well

grounded objection that foundation had not been laid to enable him to prove communicated threats.

The cases to which we are referred are exceptional in this respect.

The State had been permitted to prove actions and declarations of the accused which had preceded the homicide for the purpose of showing premeditation and malice.

Thus in the cited case of State vs. McNeely, 34 An. 1022: the accused, in the morning, a number of hours prior to the homicide, had shot at the deceased. This by the court was permitted to be proved to establish malice. The facts in this respect bear some similarity to those in State vs. Cooper, 32 An. 1085.

The court expressly states in the McNeely case that the ruling was confined to the facts and circumstances of that case.

The organ of the court in the latter case was the organ of the court in the Spell case, in which the principle was announced that the question of overt act and proof of communicated threats was largely within the jurisdiction of the trial judge, thus emphasizing the fact that the decision in the McNeely case was dependent upon the particular facts and circumstances of that case.

In the case at bar the record does not disclose that the State sought to prove prior acts or declarations of the accused in order to show malice on his part.

We are strictly confined to a consideration of the facts as stated in the bills of exception signed by the judge. They establish that there was a fight, during which the accused killed the deceased.

It is not shown that any testimony of acts or declarations prior to the difficulty which resulted in the killing was admitted.

To rebut the malice charged under these circumstances, the accused can not be permitted to prove communicated threats from deceased without having first laid the foundation requisite, by proving an overt act of the deceased against the accused.

The general rule upon that subject is established by a number of decisions.

The case at bar falls entirely within the general rule.

MOTION FOR A NEW TRIAL.

On the motion for a new trial it is urged that on the preliminary examination the court admitted the accused to bail for the reason that malice had not been shown.

That having, on the preliminary examination, pronounced the offence manslaughter, he should not have refused to admit the evidence which would in all probability have caused the jury to reach the same conclusion.

It is also stated on behalf of the accused, in the bill of exception overruling the motion for a new trial, that there were irregularities on the trial prejudicial to the accused.

The trial judge incorporates the statement in the bill that the accused was admitted to bail, after preliminary examination, on a different state of facts from that proved on the trial, and that no irregularities came within the knowledge of the court.

The questions of law relate to the admissibility of the testimony to prove communicated threats by the deceased against the accused. They were decided in passing on other bills in this case before reaching the motion for a new trial. The questions of facts presented by his motion for a new trial are not reviewable by this court.

There were other grounds of defence brought up by bills of exception in the record.

Counsel for the accused, in his carefully prepared brief, has not presented any argument in their support. We presume that they were abandoned by the defence. We have, nevertheless, given them consideration, and conclude that they also present no ground to reverse the action of the District Court.

Judgment affirmed.

No. 11,381.

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BOARD OF HEALTH VS. MAGINNIS COTTON MILLS.

ON MOTION TO FILE TRANSCRIPT OF APPEAL WITHOUT DEPOSIT FOR COSTS.

The Board of Health having failed to show that it comes within the statute "exempting the State from furnishing security for costs in the courts of this State," a rule taken in its behalf, upon the clerk of this court, requiring him to file a transcript without first furnishing the security or making the cash deposit required by the rules of this court, will be discharged.

ON THE MERITS.

The nuisance charged, if it exists at all, is of that character which should be abated.

A civil action on behalf of the public will lie if the nuisance is public.

A nuisance *per se* may be abated which affects the health, and under proper limitations and restrictions a writ of injunctian may be issued.

The functions of that writ, in behalf of the public, should only be exercised on the broad grounds of preventing irreparable injury, interminable litigation, and the protection of a public right. Their exercise is subject to the same perils and liabilities as an individual, if the thing abated is not in fact a nuisance.

The plaintiff has alleged a nuisance *per se*.

For the trial of an exception of no cause of action, the facts are necessarily admitted.

The right to the writ, at this point of the case, is shown on the face of the papers, and therefore the injunction is reinstated for further proceeding.

APPEAL from the Civil District Court, Parish of Orleans.
Theard, J.

ON MOTION TO FILE TRANSCRIPT OF APPEAL WITHOUT DEPOSIT FOR COSTS.

Frank McGloin, Attorney for the Board of Health, for the motion:

This Honorable Court has time and again declared that the State of Louisiana, as the sovereign, and as matter of privilege, is entitled to litigate in her own courts without payment of costs. Succession of Townsend, 40 An. 66; State vs. Taylor, 34 An. 978; State vs. Taylor, 33 An. 1270.

The Board of Health is a branch of the State government, having under its care the health of the entire State. Act 1882, No. 92, p. 114, Sec. 4; Revised Statutes 1870, Title Quarantine; Act 1882, No. 82, p. 103, Secs. 5, 6.

The business which the Board of Health conducts is strictly the business of the State, and it is a branch of the State government purely and simply. If the sovereignty of the State protects it from paying costs in its own courts, this sovereign exemption should apply to its business by whatsoever agency conducted. The State must act through agents.

ON THE MERITS.

Frank McGloin for the Board of Health, Plaintiff and Appellant:

Issues or outlets through which water flows from the water closets or cesspools of a large factory into the gutters of a city are nuisances *per se*, public in their character. Parker and Worthington on Public Health and Safety, Secs. 177, 187, note; Wood on Nuisances, Ed. 1893, Sec. 579, p. 799; *Ib.*, pp. 150, 582; Board of Health vs. Casey, 3 N. Y., Supp. 399; 18 N. Y. St. 251; Board of Health vs. Hutchinson, 12 Stew. Eq. 218.

In this State, the writ of injunction is a statutory remedy; and a legal remedy, as well as equitable. It will issue at the instance of the city of New Orleans to abate a public nuisance.

A municipal corporation, charged to preserve the public health within its corporate limits, may enjoin a public nuisance, notwithstanding its police regulations impose a fine upon those establishing such nuisance. Wood on Nuisances, Ed. 1893, Sec. 777, p. 1119; Sec. 743, p. 974; 14 An. 274; 11 M. 620; 36 An. 163.

The Board of Health of the State of Louisiana has jurisdiction to enact sanitary ordinances for operation within the city of New Orleans, and is authorized to cause the removal of things prejudicial to the public health, and to aid in discharge of this duty it may seek out injunction against persistent public nuisances. Act 14 of 1870, extra session; Act 80 of 1877; Act 92 of 1882.

Gilmore & Baldwin Attorneys for Defendants and Appellees:

An injunction will not be granted to restrain an alleged nuisance where there is an adequate remedy by statute. Wood on Nuisances, S. 777, p. 1119.

The existence of a legal remedy in cases of alleged nuisances will be sufficient ground for withholding an injunction. High on Injunctions, S. 745.

Where an injunction granted *ex parte* has been dissolved by the lower court on exceptions to the jurisdiction and of no cause of action, the Supreme Court will not reverse the finding of the court below and grant the injunction where there is adequate remedy provided by municipal ordinance for procedure on abatement of nuisance.

A municipal ordinance is a statute within the meaning of the word as used in the expression of courts and text writers, "Adequate remedy by statute."

ON MOTION TO FILE TRANSCRIPT OF APPEAL WITHOUT DEPOSIT FOR COSTS.

The opinion of the court was delivered by

WATKINS, J. On motion of the counsel for the Board of Health as appellant, a rule was granted upon the clerk of this court to show

cause why its appeal should not be filed without making the cash deposit required of other parties litigant, because the Board of Health, acting in the interest of the State and its people, is entitled to litigate in the courts of this State without the payment of costs.

In answer to the rule the clerk avers that (1) there is no law of this State which exempts the plaintiff in rule from making the deposit required by the rules of this court; (2) nor is there any law of this State which relieves the plaintiff in rule from the payment of clerk's costs incurred in this court.

Under the law the clerk of this court is entitled to demand and receive fees which are fixed. R. S., Sec. 756.

Under the rules of this court the party applying for the filing of a transcript in a cause in this court must first render to the clerk his bond and security, or make a deposit of twenty dollars. Rule 2. The contention of plaintiff in rule, that the Board of Health being a part of the machinery of the State government, can not, for that reason, be required to pay costs or furnish security for costs, is applicable with equal force to every municipal and parochial corporation in the State—they constituting a part of the machinery of the State government also.

The law exempts the State from furnishing security for costs, but the exemption must be strictly construed—the language of the statute being that "no court of this State, nor officer thereof, shall demand of the State, or of the Attorney General, any security for costs, or advance costs," etc. Sec. 1, Act 65 of 1884.

Counsel for appellant has referred us to the following cases as supporting this theory of plaintiff in rule, viz.: State vs. Taylor, 34 An. 978; Succession of Townsend, 40 An. 66; State vs. Taylor, 33 An. 1270.

In the *first* case cited the court said: "By special legislation all costs incurred in criminal prosecutions are to be paid by the respective parishes in which the offence charged may have been committed. R. S., Sec. 1042.

"Hence, it would be a more than idle ceremony to exact of the *State* security for costs which are not chargeable to her. 'It is well settled in American jurisprudence that the sovereign never pays costs.' This doctrine, which is essential to our system of gov-

ernment, was recently recognized by us in the case of the State vs. Succession of Taylor. 33 An. 1271."

The same principle was recognized in Succession of Townsend, 40 An. 66, and followed in State *ex rel.* Attorney General vs. Lazarus, 40 An. 856.

It is the duty of the plaintiff in rule to make out a clear case of exemption from the rule of law applicable to other litigants, but this it has not done, and its rule must be discharged.

It is therefore ordered, adjudged and decreed that the plaintiff's rule be discharged at its costs.

ON THE MERITS.

The opinion of the court was delivered by

BREAUX, J. This was an application for a writ of injunction directed to the defendant.

The petition of the Board of Health, in substance, sets out that the Maginnis Cotton Mills maintains issues or outlets from the privies and cesspools of its large factory into the public gutters of the city.

That through these outlets from the privies, cesspools, or water closets upon its property to the public gutters there flows fecal and other offensive, dangerous and injurious matter to the peril and detriment of public health and to the inconvenience of the public; that these issues or outlets are a nuisance, to abate which an injunction should issue.

Petitioner alleges that it has ordered and enjoined the defendant to close these outlets. That the defendant refuses to comply and has ignored the notices served.

The plaintiff avers that it is specially charged with the protection and preservation of public health and the removal of causes exposing the health of the inhabitants.

That the city of New Orleans has prohibited the use of any issue or other communication leading offensive matter from privies, water closets or cesspools into the public streets or gutters.

The first of these ordinances in date, copied in the transcript, ordains that privies shall be so constructed as not to have any outlet on any street, way, yard or place, and that any person violating the section shall be liable to a fine not to exceed twenty dollars and the court shall order the privy to be reconstructed in accordance with

the specifications contained in the ordinance; and in case of non-compliance, the party at fault shall be subject to another penalty not exceeding twenty dollars; and it is also ordained that the Board of Health may have the work done required by the ordinance and recover the expense from the person not complying in any court of competent jurisdiction.

This ordinance was amended, and the specifications for building privies were changed and enlarged so that the system shall apply to factories and other establishments in which a large number of workmen are employed.

The penalties fixed in the original ordinance was affirmed in the amending ordinances.

The plaintiff alleges that it, the Board of Health, also in addition and for reasons similar to those that moved the city of New Orleans, prohibited the establishment or use of the issues or communications of which it complains.

To the petition of the plaintiff exceptions of no cause of action and to the jurisdiction of the court, *ratione materiæ*, were filed.

The exception of no cause of action only is argued in this court.

This exception was maintained by the judge of the District Court.

The nuisance being denouncec by ordinances of the city of New Orleans and a penalty provided against those who commit the nuisance, it is contended that a writ of injunction should not issue, and that the authority seeking to abate the nuisance must find procedure in the statute itself.

The Board of Health, by Act 14 of 1870, was invested by the State with the power of removal of "any substance, matter or thing which they may deem detrimental to health."

It was also authorized to adopt sanitary ordinances and to fix penalties for their enforcement.

By Act 80 of 1877, the board was given power, on the concurrence of the City Council, to provide for, protect and preserve, by adequate means, the health and salubrity of the city of New Orleans, and, with the consent of the council, incur reasonable expenses to that end.

The act contains the following section:

"This act shall not be construed so as to deprive the Board of Health of any powers and authority it has under existing laws."

Section 6 of the act provides that the "board shall, in any suit or

proceeding in which it may be a party, obtain all writs, appeals or other process without being compelled to furnish bond."

The plaintiff and the City Council co-operated in adopting the first ordinance, No. 4077.

The amended city ordinances were passed by the City Council only.

The plaintiff seeks to abate an alleged nuisance by injunction, and not by the collection of a fine or the removal of the cause of nuisance by the commissioner of streets, in accordance with authority conferred for such removal.

The authority to enforce the ordinance by imposing a fine, the board contends, is too limited to prove of any service; and it is urged that the first fine, which may be much less than the limit, is imposable only once for building a privy in violation of specifications, and the second fine, also imposable only once, may be imposed for failing to obey the order to reconstruct the work and make it comply with the ordinance.

It is also argued, in behalf of plaintiff, that the jurisdiction of the Recorder's Court does not include jurisdiction over all remedies needful to enforce these ordinances and to secure prohibition from their violation that will prove effective.

The defendant argues, through counsel, that there is adequate remedy by statute, and that an injunction should not "be granted to restrain an alleged nuisance."

In weighing the different grounds of attack and defence, it suggests itself that the nuisance is no longer an "alleged nuisance."

In the present condition of the case for the purpose of the trial of the issues on the exception of the defendant the nuisance is necessarily admitted.

The fact of the nuisance is clear.

The right of the plaintiff is well defined and the law on which it depends not doubtful. They have an established right to remove the nuisance.

No judgment *at law* would add to the admitted violation.

The right to abatement being made manifest by the allegations admitted as true, it only remains for us to determine whether further remedy shall be prosecuted before the Recorder's Court or the District Court.

Each of these courts has jurisdiction over certain questions in-

volved. These are questions exclusively within the jurisdiction of the District Court.

The fact that there is a partial or even complete remedy in another tribunal in different proceedings will not alone prevent injunctive relief, but it is good reason to confine that relief to cases of a very plain character, with great prudence, where there is a continuous nuisance and to prevent its threatened repetition. Even then every step possible and legal should be taken in order not to inflict wrongful damage and loss.

The writ of injunction is of the highest character and should be granted to municipal authority on the broad ground only of "preventing irreparable injury, interminable litigation, a multiplicity of actions and the protection of rights."

It should be hedged by limitations and restrictions, and if needful its enforcement suspended until it is ascertained that a public right is violated.

"If the authorities abate a nuisance under the authority of an ordinance of the city, they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance." Wood on Nuisances, p. 976, 3d Ed.

The nuisance is clearly of that character, if it exists at all, which should be abated, if needful, by process of injunction.

We would not feel justified in curtailing the court's authority in cases of the character of the one at bar, unless the grounds were quite clear.

To plaintiff is given the power and imposed the duty of preserving and promoting public health and to that end it is invested with authority to sue for the removal of public nuisances.

It may be said of the case at bar as was said of other similar cases: "There are many cases, of which this would seem to be one, where the remedy by injunction would be much more efficacious than by enforcing the penalties of an ordinance." Wood on Nuisances, 3d Ed., p. 974, note 1.

High on Injunctions, 3d Ed., p. 568, approvingly quotes the following:

"So if plaintiff's right is clear and the injury is manifest and of a constantly recurring nature, the relief may be granted without requiring the fact of injury to be determined by an action at law."

It is announced with clearness and emphasis in Wood on Nuisances, p. 1120 (note)—

"That an injunction is a proper remedy to stay mischief resulting from a public nuisance."

In City of New Orleans vs. S. Lambert, 14 An. 247, the nuisance was not as great as the nuisance complained of in the case at bar.

The court held that the facts set forth in the petition authorized an injunction.

We do not wish to be understood as favoring hasty action in the matter of injunction applied for without bond in the interest of the public.

But where health is exposed, if there is a nuisance it should be abated, even if injunction must be resorted to for its abatement.

It is therefore ordered, adjudged and decreed that the judgment appealed from be reversed, the injunction reinstated and the cause remanded to the District Court for further proceeding according to law, and that appellee pay the cost of this appeal.

No. 11,413.

L. E. DUVALL AND WIFE VS. HENRY RODER.

The property was owned jointly by the husband and the wife.

The latter held under a *dation en paiement* made to her by her husband in satisfaction of her paraphernal rights.

The attack upon the title on the ground that it was a donation in disguise was without foundation in fact.

The consideration is proved, and shows that the declarations of the wife that she was the husband's creditor are true.

The forced heir of the husband under no contingency would have the right to annul the title placed on record in good faith and supported by ample testimony.

APPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

Merrick & Merrick Attorneys for Plaintiffs and Appellees:

Where both husband and wife join in tendering title to a piece of real estate, a portion of which had previously been conveyed to the wife by the husband as an alleged *dation en paiement*, it is no defence for one who buys and declines the title to say that such *dation en paiement* by the husband to the wife was a disguised donation.

When the husband and two corroborating witnesses and corroborating documents show a *dation en paiement* to be genuine and *bona fide*, the defendant, who offers no evidence, can not refuse the title.

In cases where the defence is frivolous the appeal will be considered frivolous and ten per cent. damages awarded.

If there had been a donation the sale to defendant would revoke it. "All donations made between married persons during marriage, though termed *inter vivos*, shall always be revocable."

"The revocation may be made by the wife without being authorized to that effect by her husband or by a court of justice." C. C., Art. 1749 (1742).

It is incredible that the legal title should be in two persons—one or both—and that an imaginary doubt of which by some one should make the property inalienable and place it out of commerce. Simplicity of title has, on the contrary, been an object of our code.

Henry P. Dart Attorney for Defendant and Appellant:

A purchaser is not bound to take a title tendered by a married woman, where the source of her title is a *dation en paiement* from her husband, unless she accompanies the tender with proof of the reality of the indebtedness, extinguished by the dation. 38 An. 813, 814; 35 An. 570-572.

This proof can only be administered judicially.

The costs and expenses of so doing should fall on the plaintiff, because it is her duty to tender a complete written title, and the judgment, if favorable, is the completion of such title in her. C. C. 2466.

Until she does so, her title is afloat, and the facts necessary to anchor it must be established, so that thereafter there may be some fixed and permanent record.

By necessity the court must be the depositary of such record, and its judgment the evidence thereof.

This proof of indebtedness can not be made by the husband only; his testimony adds nothing to the authentic declaration in the act of dation, which, of itself, is of no protection to the purchaser, who is liable to attack by the heirs of the transferror, or his creditors. The proof should be such as is required to estab-

lish any contract over five hundred dollars in amount. 38 An. 813-814.

If the proof does not maintain the allegation of indebtedness, the act of *dation en paiement* becomes merely a donation *inter vivos*, and a donation can not convey such an absolute, indefeasible title as can be forced on a purchaser, unless the donor is dead, and the status of his estate, as to debt and heirship, fixed. The title is dangerous so long as he lives. Carroll vs. Cockerham, 38 An. 813-814.

The husband and wife sign the act of tender and join in the suit to enforce; that is, nevertheless, no protection to the purchaser, where it appears that the dation is of a moiety only of the property, the husband holding title to the other, so that both are necessary parties to act and suit to convey the moiety which each holds. If anything, their joinder is but a reiteration of the undivided ownership established by the dation. It can not be construed as a sale by the husband of the whole, for the act of dation stands until revoked or rescinded, good as a donation, if unmaintained by proof of the reality of the consideration. 38 An. 819-820.

The rule that a purchaser can not be forced to take a title about which a lawsuit may hereafter arise, or which is involved in question or doubt, is a liberal rule, which requires the court to examine the question in all its aspects, and practically to decide whether there is any real danger to the purchaser, even if eventually a suit should be brought by interested parties who are not now before the court. James vs. Meyer, 41 An. 1100; Hero vs. Block, 44 An. 1032.

In suits like these the purchaser who acquiesces in the decision of the lower court saves nothing; it avails not even to force a purchaser under him. He must at his peril obtain the opinion of the court of last resort.

For so doing he should never be mulcted in damages. Such an appeal is not frivolous. James vs. Meyer, 41 An. 1102.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs sued the defendant to compel him to accept title to a house and lot described in their petition.

The title tendered is in the name of L. E. Duvall and wife. The property had been sold to L. E. Duvall in the year 1890 for the sum of three thousand three hundred dollars.

The wife acquired her half in indivision by *dation en paiement* from her husband on the 18th day of August, 1892, at a value of two thousand dollars.

In reference to the wife's half, the defendant argues that he could not safely accept the wife's title without proof of a real consideration moving the giving in paymert by her husband; that the act is only a *prima facie* title and no more protection than would be a donation *inter vivos* between the same parties.

That if the dation was in reality without consideration or a disguised donation, there could in a proper contingency be an attack upon the title by forced heirs.

The judge of the District Court rejected that defence and pronounced judgment in favor of the plaintiffs, from which the defendant appeals.

The record contains ample testimony, showing that L. E. Duvall, one of the plaintiffs, was indebted to Mrs. Duvall, his wife, for property brought him in marriage.

It was in satisfaction of that debt that the transfer was made.

Witnesses established that she had brought a larger amount in marriage than the sum at which the property was valued, and for which she had become the owner.

The total consists of different items, in regard to which there is some difference among the witnesses as to the respective amounts.

Adding the minimum amounts established by each witness as sums for which the husband was responsible to his wife, the total is more than sufficient to prove the complete reality of the consideration.

Moreover, the wife was in possession under a title placed of record some time prior to the sale to the defendant.

It operates as a notice that she was the owner in the absolute enjoyment of the property as owner; that she had, under a permissive article of the Civil Code, chosen to accept in complete satisfaction of the claims stated in the deed as due her by her husband.

We are not inclined to enlarge the principles held in the case of Tessier vs. Reussel, 41 An. 474, regarding donation *inter vivos*. If not kept within reasonable limits it would have the effect of placing

property out of commerce in every case in which a discussion can be raised regarding the sufficiency of the consideration of a *dation en paiement.*

All considerations in law and morals unite to the conclusion that a married woman should be held bound by her declarations in an authentic deed that she was a creditor of her husband for the price of the property transferred.

Her forced heirs would not be in a better position, to have an act annulled, passed in the utmost good faith, with every appearance of fairness and valid consideration, amply supported by the testimony of the witnesses.

The appellees, in their answer to the appeal, pray for ten per cent. damages for frivolous appeal.

The defendant's grounds of defence were not, by any means, devoid of all merit.

He sought to acquire a title translative of property, free from all claims in every possible contingency. The facts were such that it was entirely reasonable to seek the decision of the court of last resort in order to place at rest all possible discussion about the title.

The defendant urges that plaintiffs must stand the expense of making a perfect title, and that such expense covers the costs of this suit they should be condemned to pay.

We deem it sufficient answer to say that costs are due him who recovers judgment.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed at appellant's costs.

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No. 11,414.

HEIMS ABES AND WIFE VS. AARON DAVIS.

Donations between the spouses are revocable by mutual consent, and when revoked, the property returns to the estate of the donor freed from any claim of his heirs for their legitime, which might have attached to the property if the donation had not been revoked. Civil Code, Articles 1493, 1559; Scudder vs. Howe, 44 An. 1103.

APPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

James Wilkinson Attorney for Plaintiffs and Appellants:

The revocation by mutual consent of a donation restores the property to the donor and dissolves the original donation. Scudder vs. Howe, 44 An. 1107.

Donations *propter nuptias* between the spouses are subject to this right of revocation by mutual consent. Rev. C. C., Articles 1745, 1734, 1559, par. 4; 1740, 1749, 1564.

A. J. Peters for Defendant and Appellee.

The opinion of the court was delivered by

MILLER, J. The suit is to compel defendant to accept title and pay for property sold to him by plaintiff, Heims Abes. The defence is the property was donated by plaintiff to his wife in their marriage contract; that though this donation was afterward revoked, the property by the effect of the donation became and is now subject to any claims of the donor's children for their legitime. The judgment of the lower court was in favor of defendant and plaintiff appeals.

Donations between the spouses are revocable. When revoked the property returns to the donor free from any claims of his children for their legitime they might have if the donation was not revoked. In other words the property returns to the donor not by any new title, but simply because the donation is deemed never to have taken place. It follows that the plaintiff, Abes, can sell and his vendee can acquire the property as freely as if the donation had never been made. Civil Code, Articles 1749, 1559, par. 4; Scudder vs. Howe, 44 An. 1103.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided, annulled and reversed, and that the defendant, Aaron Davis, be and he is hereby ordered to complete the sale of the property described in the petition, purchased by him from plaintiff, Heims Abes, and that he pay plaintiff the price therefor stipulated to be paid, to-wit: nine thousand dollars, with legal interest from judicial demand, with costs of appeal and of the lower court.

No. 11,387.

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PETER FABACHER VS. BRYANT & MATHER.

Courts will not adjust a controversy arising out of the illegal purpose and attempt of a Draymen's Association to deprive the presses of this city of the right to choose the labor required for hauling cotton, the association proposing to accomplish this by passing a tariff of charges for hauling, designating their members to do the hauling, and subscribing money to prevent the presses from obtaining any labor except that furnished by the association, to be paid according to their tariff, and the testimony showing that the purpose was made effective by the money put up by the association and other methods by which non-union men were compelled to abandon the service of the presses. Civil Code, Arts. 1893, 1895; India Association vs. Kyle, 14 An. 118; Gravier vs. Carraby, 17 La. 142, and cases collected in 2d Hennen's Digest, 1007, No. 1.

The court in aid of public policy and the law will notice irrespective of the pleadings that the controversy submitted for adjudication grows out of illegal purposes or combinations, and that illegality manifested by the record, it is obligatory on the court to dismiss the suit. *Ibid.*

APPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

Lazarus, Moore & Luce Attorneys for Plaintiffs and Appellants:

Bryant & Mather refused to carry out in good faith the contract into which they had entered, and because of the violation of said contract by them, Fabacher, in consequence thereof, sustained damages which are fully and specifically set out in the petition, and are as amply sustained by the evidence.

As an excuse for this gross breach of their contract, Bryant & Mather, admitting that Peter Fabacher was given the contract to do the hauling as set out in his petition, say that they entered into this contract with Fabacher upon the supposition and representation of said Fabacher that he had been assigned to do the hauling by the Draymen's Association, but that subsequently they discovered that Fabacher had not been selected by the said association to do their hauling, but that one Thomas Egan, Jr., had been; that, thereupon, they withdrew from their contract with Fabacher and gave their hauling to said Egan, who defendants allege had truly been selected by the Draymen's Association to do the hauling of cotton for the Louisiana Press.

They further contend that Peter Fabacher never had been selected by the Draymen's Association to do the hauling, and that any representation or pretext on his part that he had been is absolutely untrue and unfounded; and that, on the contrary, the minutes of the association show that Thomas Egan, Jr., had been allotted to do the hauling of the said press on August 6, 1891, and by reason of this allotment and the false representations of said Fabacher they had canceled and withdrawn the contract they had made with said Fabacher.

They go on further and set up that Egan guaranteed to hold them harmless in the premises if they would withdraw their contract from Fabacher, and to pay and reimburse them all such damage, counsel fees, etc., which they may sustain in the event of the court holding them liable in damages for breach of their contract with Fabacher; and they call said Thomas Egan, Jr., in warranty.

The answer of Egan, the warrantor, is substantially the same as that of Bryant & Mather. He denies that Fabacher ever was selected by the Draymen's Association to do the inhauling of the press. He admits that he (Egan) was selected for such hauling by the association, and joins Bryant & Mather in their general averments against Fabacher.

E. D. Saunders, *E. W. Huntington* and *H. L. Dufour* Attorneys for Defendants and Warrantor, Appellees:

Bryant & Mather were under compulsion, in order to carry on their business, to take such draymen as were assigned them by the Draymen's Association.

They first made a contract with Egan, a member of that association.

Then Fabacher came to their office, introduced himself and declared that the association had assigned him their work. Believing this representation to be true they gave him an order on carriers for their cotton.

Neither Bryant & Mather nor Fabacher said a word as to the rate at which the hauling was to be done.

Egan next turns up and denies that the association had assigned the work to Fabacher.

For two or three weeks all parties, Bryant & Mather, Fabacher and Egan, are appealing to the association to decide to whom it had assigned the work.

The final decision of the association was in favor of Egan and against Fabacher.

There was no contract between Bryant & Mather and Fabacher.

(*a*) Because the sole representation by which he obtained the order on the carriers, viz.: his statement that his association had assigned him the work, was eventually declared to be untrue by the association itself.

(*b*) Because there was no agreement as to one of the essential elements of the contract of hiring, viz.: the price at which the work was to be done. The order on the carriers did not fix the price, and nothing was said on that subject by either party.

No damages recoverable even if there were a contract:

(*a*) Because it was Fabacher's duty to sell the mules promptly, and so diminish the loss; instead of which he kept them several months, said nothing to defendants, let the best season for selling pass, and sold at the worst season.

(*b*) Because it is not shown, even by plaintiff's own witnesses, that Fabacher would have made any profit if he had kept the contract.

The opinion of the court was delivered by

MILLER, J. The plaintiff, engaged in the business of hauling cotton for the presses in this city, alleges he was employed by defendants, proprietors of the Louisiana Cotton Press, to do what is termed the inhauling of cotton for that press for the seasons of 1891-92. The petition alleges the breach of the contract and claims large damages. The answer of the defendants is, in effect, that at the period of the alleged contract there was no option for the presses of this city in respect to the employment of draymen, but they had to engage those designated by the Draymen's Association; that accordingly they contracted with Thomas Egan, a member of the association, that later the plaintiff called on defendants, announced himself as the choice of the association, and under that representation they were led to give him an order for cotton intended for their press, but the representation, the answer avers, was untrue; that, in fact, Egan, with whom they had already contracted, had been

selected by the association, and he claimed his rights, which defendants recognized. That defendants, alleging that Egan was bound to defend them against the demand in the petition, called him in warranty. The warrantor answered, averring his selection by the association, his rights under his contract with defendants, and controverting the plaintiff's demand. The case was submitted to a jury; the verdict was for plaintiff, but on the new trial granted by the court judgment was rendered in favor of defendants, and plaintiff appealed. The record of over seven hundred pages teems with exceptions to the testimony and ruling of the lower court, but the case as presented to this court submits the issue for our determination without reference to the exceptions.

It is in evidence that the Associated Draymen of the city, in the cotton season of 1891–92, adopted a tariff of charges for hauling cotton, and undertook to distribute among the members of the association the hauling of the various presses. In the theory of this association, the presses were to be consulted neither in reference to the price to be paid or as to those who should do the hauling. It is claimed, however, that in all this the association contemplated no compulsion whatever to be exerted on the presses. The weight due to this disclaimer of compulsion is well illustrated by the record. It is established that, not content with organizing the labor of the city on a tariff of charges and assigning to the various presses the draymen to be employed by them, the members of the association subscribed money to put it beyond the power of the presses to employ any other than association or union men. The precise method in which it was proposed to use the money is not disclosed by the record. Whether to keep union men from working in the presses until the draymen's tariff of charges was accepted, or to deter non-union men from that service, the effect was the presses were utterly unable to obtain any labor except that prescribed by the association, to be paid the prices exacted by the tariff. Any exertion of choice by the presses in respect to the labor required for hauling resulted in non-union men being driven from their drays. The defendants had exercised their supposed right of choosing their labor, and their choice had fallen on non-union men. But after a struggle of a few days the men selected by the defendants were compelled to leave their employment. In the language of the president of the association, testifying in this case, the non-union men "quit." The methods that

made them "quit" were, to say the least, not pacific. In the letter we find in the record of the plaintiff, he congratulates the association on its success over the non-union men who for a few days of hopeless effort attempted to dray for defendants. The officers of the association who testify, strenuously disclaim violence, as not within the scope of the association. An organization with its tariff of charges and allotment of members, to be accepted by the presses, makes, we think, a large advance toward promoting violence, when it puts up money to prevent the employment of any except its members, and this tendency of the measures of the association, we think, finds illustration in the record. Other methods serve as effectively as the money, the subscription of which is avowed, and, it is our conclusion, were employed.

In the condition existing in this city in the beginning of the cotton season of 1891-92, the defendants found themselves with no alternative in respect to the labor needed for the hauling of cotton. It was union men at tariff prices or no labor. The defendants acted on the theory that at least they would be permitted to choose a union man, and accordingly selected Egan, the warrantor in this case, who claimed the Louisiana press had been assigned to him by the association. Hardly had this contract with Egan been closed, when the plaintiff Fabacher presented himself with the claim he, and not Egan, had been chosen by the association. The plaintiff testifies it was not his purpose to force himself on defendants. There was, however, in his intercourse with defendants no discussion or preliminaries usual to the making of contracts when the parties occupy equal positions. The defendants recognized the potency of the selection of the plaintiff by the association stated by the plaintiff, and on the faith of that representation gave plaintiff an order for the delivery of the cotton intended for their press. It is this order the plaintiff deems his contract. Here the defendant supposed the trouble ended. They had under pressure discarded the non-union labor previously secured; they had next engaged Egan, a union man, and because he was a member of the all-powerful association, and now at the requirement of the association, as they supposed, they employed Fabacher. But Egan clung to his contract, strenuously denied that Fabacher had been selected, and notified defendants he would hold them for damages if they undertook to withdraw from him the hauling. Thus the unfortunate defendants practically, with no control over

their contract, were involved from no fault of their own in the contention between two members of the association whether one or the other had been chosen to do the work of the press. The defendants in urgent need of labor, with no opportunity of obtaining it except from the association, and compelled to exercise their judgment between the two contestants, determined Egan had the better claim of recognition by the association gave him their order for all cotton intended for the Louisiana press. The result is this suit by plaintiff.

It is claimed the court is called on to determine the issue whether plaintiff had any contract with defendant and to annul damages if the contract exists and has been violated by defendant. In our appreciation there is another question forced on our attention by this record. The court is practically called on to find whether Egan or plaintiff was chosen by the association, and when that issue is determined to give effect to the actions of the association prescribing to defendants the employment of one or the other of these contestants. For plaintiff's asserted employment rests on his representation of selection by the association, and if there was no basis for that representation there is no ground for plaintiff to complain that defendants gave their hauling to Egan. All the parties accept that this issue of the choice of the association is that to be solved by this court, and to that end the minutes of the association and copious testimony of its proceedings undertaking to prescribe the persons, members of the association, to do the hauling for the presses of the city, have been put in evidence and discussed at the bar. It is the right of the members of the association to establish their tariff of charges and decline service unless on their terms. But when the association goes beyond this, and undertakes by subscriptions of money, or other means, to prevent the presses of this city from obtaining any labor for hauling cotton except, that furnished by the association, that purpose of the association is plainly repugnant to public policy and the law. It was in aid of and an essential part of that illegal purpose that the association designated its member, whether one or the other of the contestants, to do the hauling of the Louisiana press. It is said this designation was, after all, a mere recommendation. This argument supposes the presses were unable or unwilling to select the required labor, and referred that selection to the association. The so-called recommendation should bear another name. It carried the significance, accept the recommenda-

tion or no labor will be attainable, and the power and machinery of the association it is manifest, from this record, were competent to enforce that significance. How was it until all had been made to realize the potency in this respect of the association, that the defendants yielded all choice? The non-union men originally selected by them were denied admission as union men, compelled to abandon their drays, and the letter of the plaintiff himself exults in this triumph over defendants' rights. It is clearly, in the prosecution of the unlawful purpose of preventing defendants from procuring labor of their choice and compelling the employment of union men designated by the association, that the issue in this cause arises, to be solved by an examination of the proceedings of the association and when thus ascertained this court is expected to enforce. If Fabacher is adjudged to have been the choice of the association, his asserted contract is to be maintained and defendants mulcted in damages. If Egan is found to have been more fortunate in the deliberations of this body, then defendant's contract with him is to be permitted to stand. The designation of either is linked to an illegal purpose in aid of which there is on the plainest principles no appeal to the courts. It is trite in our jurisprudence that contentions originating in unlawful purposes are not to be brought into courts of justice. It is obligatory on the court to take notice, irrespective of the pleadings, of the phase of this controversy under discussion and conspicuous in this record. It is deemed appropriate on this occasion to convey the instruction that a controversy of this character can find no adjustment here, but the parties will be left as they stand.. Civil Code, Arts. 1893, 1895; India Association vs. Kock, 14 An. 168; Gravier vs. Carraby, 17 La. 142, and cases collected in 2d Hennen's Digest, p. 1007, No. 1.

Our learned brother of the lower court was in some doubt whether duress as a defence was pleaded. He finally left it to the jury as an issue to be determined. He was right in this. The jury, notwithstanding his charge, gave plaintiff a verdict. That the lower court set aside and dismissed the suit fully warranted, we think, by the record.

It may be added that the motive or consideration for the contract asserted by plaintiff, arising as it did from the representation that he had been selected by the association, the import of that representation was practically that the association had definitely settled

for defendants the party they should employ. In point of fact, there had been no such settlement. There were meetings after plaintiff's representation to determine the question. The fortunes of the contestants fluctuated, as one or the other had friends at these meetings. Egan claimed selection in August. Plaintiff asserted his selection in September. Plaintiff maintained his ground at three meetings, but the contention went on. The defendants had no access to the meetings, nor voice nor part in their deliberations, to determine who should do their work. This suit affirms they are to suffer because of the uncertainty in the councils of the association. If they yielded to plaintiff they were menaced with Egan's suit. Assured by Egan he had been chosen, and abiding by their contract with him, they are subjected to this suit. But at the final meetings of the association on the 1st and 12th of October the choice of the association was declared to rest on Egan.

If there were no other ground, we think this final action should have relieved the defendants from this suit on an asserted contract, the assent to which, if assent it can be called, rested on the plaintiff's representation that he had been chosen, not verified by the action of the association whose choice of himself he had undertaken to affirm.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed, at the costs of the appellant.

No. 11,546.

STATE OF LOUISIANA VS. JOSEPH E. TOUCHET.

46 827
115 968

1. Section 1010 of the Revised Statutes makes it the duty of a justice of the peace to order arrests for alleged crime uron the oath of one or more "credible" witnesses. It is not the statement or even the affidavit of every persou upon which he is called to act or which furnishes the "knowledge conveyed to a public officer" which opens the running of prescription against a prosecution for crime.
2. The law contemplates that an officer shall bring a sound legal discretion to bear in ascertaining whether a charge, if made, should be seriously considered, and where, under the special facts of a particular case, an officer was warranted in not taking action upon what is afterward set up in a plea of prescription as his knowledge of the commission of a crime by a particular person the plea is properly overruled.

APPEAL from the Seventeenth District Court, Parish of Vermilion. *Allen, J.*

M. J. Cunningham, Attorney General, and *M. T. Gordy, Jr.*, District Attorney, for the State.

L. L. Bourges and *W. P. Edwards*, Attorneys for Defendant and Appellant.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant was convicted of having stolen a coat and he has appealed. He urges in this, as he did in the lower court, the prescription of one year in bar of the action.

The crime is charged to have been committed on the 19th of April, 1892. The information against the accused was filed on September 12, 1893. It contained a declaration that it was filed within one year from the time that the information in relation thereto, came to the knowlege of a public officer having power to direct investigations and prosecutions.

Testimony was introduced to disprove the correctness of this statement.

It appears that one Sevenne Conners was originally charged with the crime upon an affidavit made against him before J. Nelson Greene, justice of the peace of the third ward for the parish of Vermilion. As the result of a preliminary examination he was sent before the District Court. He was twice tried. On the first trial the jury disagreed. After the second trial the record shows he was discharged, but does not show under what circumstances the discharge took place. We infer that he was either acquitted or there was another mistrial and an abandonment by the State of the charge against him, for on the day of his discharge the information mentioned was filed against defendant Touchet. The district attorney says in his testimony that it was only upon the second trial of Conners that the evidence pointed to the present defendant as the guilty party; that the evidence taken on the preliminary examination, and that on the first trial indicated that the charge against Conners was well founded. That immediately on ascertaining the new state of the evidence he filed the information against Touchet. That the change in the evidence resulted from the bringing forward of several witnesses who had not testified before. The justice of the peace before whom the affidavit against Conners was made, and

who conducted the preliminary examination referred to, states that the daughter of Conners testified as a witness on the preliminary examination that "Touchet" had taken the coat, but that he did not believe her; he also states that after the preliminary examination was over, and after Conners had been sent for trial on the charge, Conners offered to take an affidavit against the defendant, but he declined to have it taken, assigning as a reason that Conners on the preliminary examination against himself had not then taken the stand and sworn to the facts against Touchet.

It is evident from the testimony of the justice of the peace that he did not believe either the testimony of the daughter or the statement of Conners, and that so far from considering that Touchet was the person to be prosecuted, he was of the opinion that the persons who were accusing him were attempting to improperly shield the person really chargeable—Conners.

His official action shows that he believed Connors to be the guilty party, and, as we have said, the district attorney says the evidence on the preliminary examination justified that belief. We do not think that under the circumstances stated, it could be held that the justice had such knowledge of Touchet's having committed the crime, as would in law serve as the starting point for prescription. The knowledge conveyed to an officer to have that result, must be such as would have warranted him acting in the exercise of sound judicial discretion in ordering an arrest. It is not the statement or even the affidavit of every person on which the justice is to act. Section 1010 of the Revised Statutes makes it the duty of the justice to make an arrest upon the oath of one or more *credible* witnesses. The law contemplates that he should bring his judgment to bear in reaching a conclusion as to whether an arrest would be justified, and whether the charge if made should be seriously considered. The whole evidence in this case then at hand having been submitted to the justice of the peace, he could well refuse to receive Conners' affidavit, he having himself just determined on that evidence (so far as he could determine) that Conners was chargeable with the act. The legal situation is not affected by subsequent developments showing that the actual facts of the case, were different from what they had every appearance of being, when official action was called for. We think, under the facts of this special case, that prescription only began to run when the district attorney became advised of the real situation.

There is no claim that prescription has run from that date. It is therefore ordered, adjudged and decreed that the judgment appealed from be affirmed.

Rehearing refused.

46 830
47 293

46 830
50 658
51 1104

No. 11,526.

STATE EX REL. E. S. WHITAKER VS. THOMAS R. ADAMS ET AL.

The provisions of Article 201 of the Constitution, that for any of the causes enumerated in Article 196 district attorneys, clerks of court, sheriffs, coroners, recorders, justices of the peace, and all other parish, municipal and ward officers, shall be removed by judgment of the District Court of the domicile of such officer (in the parish of Orleans the Civil District Court) are not exclusive of all other methods by which municipal officers may be displaced. The power granted by the General Assembly in Secs. 58 *et seq.* of the charter of New Orleans to the Common Council to remove the recorders of the Recorder's Courts by impeachment proceedings is constitutionally granted.

APPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

Farrar, Jonas & Kruttschnitt Attorneys for Relator, Appellee:

When a Constitution provides for the qualification of certain officers, for their removal for certain causes, by certain authorities, and in a certain way, a Legislature is incompetent to prescribe, as to those same officers, for different qualifications, different causes of removal, different authorities or different ways. It can neither add nor take from the constitutional provisions on those subjects. State *ex rel.* Downes vs. Towne, 21 An. 490; State *ex rel.* Robinson vs. Dranguet, 23 An. 784; State *ex rel.* Koppel vs. Thompson, 28 An. 444; State *ex rel.* Lemonnier vs. Beard, 34 An. 273; Richard vs. Rousseau, 35 An. 933; Cooley's Constitutional Limitations, 6th Ed., pp. 78, 79.

E. A. O'Sullivan, City Attorney, for Defendants and Appellants:

Sections 58, 59, 60, 61 and 62 of Act 20 of 1882, City Charter, are constitutional. They do not violate Arts. 196 and 201 of the Constitution of 1879.

The police recorder of the city of New Orleans is not a constitutional officer, but is a creature of the Legislature. 10 An. 620, State vs. Ramos.

The Constitution, giving the power to the General Assembly to provide for police or magistrates' courts, likewise gave it the power to enact laws for the government of said courts.

The power of impeachment and amotion is inherent to all political corporations, unless specially denied. Richard vs. Rousseau, 35 An. 933.

Constitutional officers can not be impeached or removed for other causes than those specified in the Constitution; officers not mentioned may.

Officers created by the Legislature under constitutional power may be impeached and removed for causes assigned by the Legislature. Behan vs. Judges, 35 An. 1075; Lemonnier vs. Beard, 34 An. 273.

The opinion of the court was delivered by

NICHOLLS, C. J. The question submitted to us for decision is whether, whilst the recorder of the First Recorder's Court of the city of New Orleans is present, able and willing to perform the duties of his office, he can be suspended from exercising his functions and temporarily replaced by the recorder *pro tem.*, through an order of suspension from the mayor of the city, this order being grounded upon the pendency of impeachment proceedings before the City Council directed against the recorder.

Defendants invoke, in favor of the affirmative of this proposition, Section 58 *et seq.* of Act No. 20 of 1882, known as the Charter of the City of New Orleans, which confer upon the common council the power of impeachment, and name the recorders of the city, among others, as holding their offices subject to this power.

Relator's contention, on the other hand, is that for high crimes and misdemeanors, for non-feasance and malfeasance in office, for incompetency, for corruption, favoritism, extortion or oppression in office, or for gross misconduct or habitual drunkenness, an exclusive method of removal from office is provided by Article 201 of the Constitution, which declares that for such causes district attorneys, clerks of court, sheriffs, coroners, justices of the peace, and all other parish, municipal and ward officers, shall be removed by judgment of the District Court of the domicile of such officer, and that the office which he holds is one of the offices covered by the article.

Recorders of New Orleans are part and parcel of the machinery of the city government. They are not constitutional officers. The Recorder's Court is purely a statute court. It might be conceded that the recorders, as to removal from office, fall under the terms of Article 201 of the Constitution without determining the issue raised in this case.

The real issue is whether the power of removal referred to in the article of the Constitution is identical with the power of amotion, impeachment or *quasi* impeachment, on which the defendants base their right to act, and whether proceedings under Article 201 are exclusive of any other method by which municipal officers may be displaced. If the two proceedings are referable to separate and distinct powers as the source from which they spring, and the former method of removal is not necessarily exclusive of the latter, the provisions of Article 201 of the Constitution do not control this case. Relator's contention that he is not "*removable for cause*," otherwise than by the Civil District Court, could be well admitted as thoroughly correct if "judicial" proceedings be referred to, and yet the course pursued by the defendants be perfectly sustainable as legal.

That the General Assembly conceived there was a difference between "judicial removals for cause after trial," and impeachment, *quasi* impeachment or amotion of its officers by a municipal body acting politically and in the discharge of an administrative duty, and that both could be resorted to though under different circumstances and varying conditions, appears on the face of the act; for whilst Section 49 declares that for the causes specified in Art. 196 of the Constitution the recorders shall be "removed" in the manner pointed out by Art. 201, Sections 58 *et seq.* confer expressly upon the council the power of "*impeaching*" these same recorders.

We are of the opinion that the Legislature was justified in making the distinction it did. Proceedings for the removal of officers, whether by that name or that of impeachment, addressal, expulsion, amotion, or *quasi* impeachment, do not properly and regularly belong to the judicial department; they are universally recognized as arising in and from the exercise of the political power of the State, lodged in its legislative and executive branches. If the judiciary has jurisdiction in any manner, shape or form over such proceedings it is only by virtue of direct special exceptional grant. Whilst the distribution of the different powers in a State to the different depart-

ments is of course under the control of the convention which framed the organic law, and it is at liberty in its apportionment of powers to depart in greater or lesser degree from what is and has been for generations regarded as the functions legitimately belonging to each and those separating each, and such action must be maintained and enforced, it is none the less true that such action preserves a distinctive exceptional character. As exceptional in its nature it has to a degree to be construed as to its scope by the rules governing exceptional legislation. Whilst full effect is to be given to it, it should be kept within precise limits and not be extended beyond the cases evidently contemplated to be covered by it. The reason, the object and the purpose to which it owed its origin must be constantly kept in view.

It must be conceded that in adopting Art. 201 of the Constitution the convention made not only a departure, but a very great departure from established principles. We are therefore of the opinion that when it provided a method for the removal of officers through courts, after a full trial and slow and regular judicial proceedings, it intended to establish special and additional, and not an exclusive method of removal, and that if the proceeding be exclusive it is exclusive only to the extent that it has been so specially made by express declaration. What was the object and purpose of this extraordinary grant of exceptional power to the judiciary? In our opinion, it was to furnish a guard and a protection against the unjustifiable continuance in office of incompetent and unworthy officers, by giving to the people, acting directly in their own right, a special remedy to which they could themselves have free recourse, independently of the official action of others. *Without* this article the people would have to rely entirely for relief upon the Governor, or General Assembly or the municipal authorities, who, no matter how great the occasion or cause for action might be, would be free to act or not as they thought proper. *With* the article they could of themselves force an issue in any given case—wilful inaction, misplaced friendship, or partisan favoritism to the contrary notwithstanding.

A second purpose was to substitute, in lieu of the removal of officers by addressal by mere resolution, the special method of removal through judicial proceedings, without interfering or clashing with other powers either of the Legislature or of the municipal authorities.

That the convention did not think that the method of removal of officers provided for by Article 201 was exclusive of others of and by

its own force, but required a direct affirmative declaration to that effect to make it exclusive, will appear from Article 152, in which it is provided that *quoad* addressals from office by the Legislature it should be so to the extent of its terms.

The absolute deprivation of the political right of holding an office under the State, or of holding a municipal office under the City Charter, brought about through the instrumentality of the Legislature or the municipal authorities, is something other and different from the temporary displacement of an officer from an office to which he might again be legally elected or appointed, operated through the courts by regular judicial proceedings.

The source of power of the two proceedings is not only different, but the penalty is different and the character of the proceedings is different, one being political and administrative, the other being judicial by constitutional grant. A proceeding for the "judicial" removal of a district judge would not bar an "impeachment" proceeding by the Legislature against the same judge for the same offences whilst he was still in office. Pursuing the subject further, we find that the Constitution reserved and gave to the General Assembly full power and control over the creation of a government for the City of New Orleans. It did so with knowledge of and with reference to the well recognized existence inherently in municipal corporations of the power of removal or amotion of its officers, and in giving this unrestricted power to the General Assembly it must have contemplated and did contemplate that in creating the corporation the Legislature would deal with that power, either widening or restraining it, as in its judgment it would deem best. The General Assembly, under the Constitution, had the power to determine what the officers of the corporation should be, and to define and fix their respective duties. It had the right to fix and determine what the qualification for those offices should be—the terms and conditions upon which they should be assumed, and the terms, conditions and circumstances under which they should be vacated. Every person accepting office under the City Charter accepted it on the conditions constitutionally affixed to the office in the charter.

The Recorders' Courts, as we have said, are part of the machinery of the City government. They were not organized by direct special act, under the grant of power conveyed in Art. 136 of the Constitution, but through the act organizing the City under the constitu-

tionally reserved and granted power of creating a government for the City. The courts are purely statute courts, liable to entirely disappear by legislative action, and subject to modification as to their powers, just as is the City government of which they form a part.

We do not think that any of the decisions quoted by relator reach this case. The only point decided in Richard vs. Rousseau, 35 An. 934, was that Art. 201 of the Constitution had no reference to minor officers elected by the various parish and municipal corporations of the State. The mind of the Chief Justice, who was the organ of the court on that occasion, was as to who was *outside* of the provisions of the article, not who was inside of the same, nor what the *effect* of being within it would be.

The fact referred to in relator's brief, that the recorders are elected by the people and not by the Common Council, would perhaps have furnished a good argument before the Legislature in favor of withholding the power of amotion from reaching the recorders, but it does not legally affect the situation when the General Assembly has thought proper not to do so, and there was no constitutional obligation on its part to withhold it. It must be observed, however, that the Mayor of the City and other officers elected by the people are brought under the operation of the same power. It may also be observed that the attention of the Legislature seems to have been directed to this subject, and to the cases of the officers elected by the people, as in one respect it distinguishes them from those elected by the Council, for Sec. 30 of the act declares "*that in addition* to the power of removal by way of impeachment the Council shall have power to *remove* at any time from office any officer of the Council *elected* by them by resolution declaratory of its want of confidence in said officer, provided that two-thirds of the members elected to said Council shall vote in favor of said resolution." (Italics ours.)

In the minds of some persons it may doubtless be considered unwise to have lodged in the Common Council as much power over the elective officers as the General Assembly has granted to it, but we are not to deal with statutes from what we might consider impolitic or unwise. The issues which are presented in this case are similar to those in the case of the State *ex rel.* Behan vs. Judge, 35 An. 1075, though advanced at a little later stage of the impeachment proceedings and presented under a somewhat different form. The

decision in that case strongly supports the views herein expressed. We discover no unconstitutionality in Act No. 20 of 1882 in the respects complained of. The impeachment proceedings being legal, the order of suspension based thereon was also legal. For the reasons assigned, it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that relator's demand be rejected at his costs.

CONCURRING OPINION.

WATKINS, J. The statement of this case is best given in the language of the relator's petition, thus:

"That your relator was, on the 22d day of April, 1892, elected Recorder of the First Recorder's Court of the City of New Orleans, for the term of four (4) years.

"That he was thereafter duly commissioned, qualified and took possession of, and enjoyed the office of Recorder of the First Recorder's Court of the City of New Orleans, until the 18th day of January, 1894, when one Thomas R. Adams did usurp, intrude into and unlawfully take possession of the said office of Recorder of the First Recorder's Court of the City of New Orleans, and has ever since continued to usurp, intrude into, unlawfully hold and exercise the functions of said office, to which your relator is lawfully entitled, and which he has the right to exercise.

"That the said Thomas R. Adams claims the said office by virtue of a certain *alleged order of the Mayor of the City of New Orleans, suspending your relator as Recorder of said court, and by virtue of certain alleged proceedings taken by the Common Council of the City of New Orleans, through its Committee on Public Order, as also through all of its members, sitting as an alleged court of impeachment, to remove your relator from the office aforesaid.*

"*That said alleged order of suspension, and said proceedings of said City Council* are all taken under authority alleged to be vested in said Mayor and said Common Council, and its Committee of Public Order, under the Charter of said City, being Act No. 20 of the Acts of the Legislature of the State of Louisiana for the year 1882, and especially under Sec. 19, and Secs. 58 to 62, inclusive, of said Act.

"Relator further avers that said Act of the Legislature of the year 1882, and especially the hereinabove named sections of said Act, *in*

so far as the same purport to confer upon the Mayor of the City of New Orleans, or the members of the Common Council of said City, or any number of them, any power to suspend your relator as Recorder of said Court, or to remove him from his office as Recorder of said Court, are unconstitutional, null and void, for this, that the said Act, in so far as it vests any power in said City Council or in said Mayor to suspend or remove your relator from office, vests in said Mayor and Common Council judicial functions, in violation of Arts. 14 and 15 of the Constitution of the State of Louisiana, and it also violates Arts. 196 and 201 of said Constitution, which confer upon the Civil District Court for the Parish of Orleans alone the power of removing your relator from said office.

"That the said Thomas R. Adams, notwithstanding the premises, pretends and claims that he has the right to exercise the duties of the First Recorder's Court of the City of New Orleans; that he is entitled to perform the duties of said office, and to receive the salary thereof, notwithstanding the fact that your relator is not sick, nor absent from the City of New Orleans, nor legally suspended from office."

The prayer of the petition is that the said Thomas R. Adams may be ousted from the said claim, and debarred from asserting the same against relator; that it may be adjudged and decreed that he is the Judge of said First Recorder's Court, and entitled to perform its functions and to receive its profits, honors and emoluments, notwithstanding said order of suspension and the proceedings of the City Council looking to his impeachment and removal from office.

The answer is, practically, a general denial, coupled with an averment of the Mayor's right to suspend the relator from the performance of the duties of his office, under the powers vested in him by law.

It further avers that the provisions of the City Charter in no manner conflict with the Constitution, the relator being a municipal, and not a constitutional officer. That recorders' courts in the City of New Orleans were for the first time created by the City Charter of 1882, and for that reason the provisions of the Constitution (adopted in 1879) did not include the judges of these recorders' courts. That, as these offices were created by the Legislature, it was competent for it to indicate the mode of electing and displacing the incumbents of them; and, for that reason, the act of the Legislature does not come in conflict with the Constitution.

On these issues the case was tried and judgment was pronounced in favor of the relator, and the respondent has appealed.

The Judge *a quo* assigned as his "reasons for judgment" that the relator is a municipal officer, and comes within the designation and provisions of Art. 201 of the Constitution, viz.: "and all other, parish, municipal and ward officers;" and that "the formidable power and responsibility of removal having been, by the sovereign will, formulated in the Constitution, lodged in the *judiciary alone*, can not be delegated by the Legislature—a co-ordinate department of the State government—to another body of magistracy. A consideration of Arts. 14 and 15 of the Constitution makes this conclusion more inevitable and imperative. "The Mayor and Common Council are without power in the premises."

It is evident that the judge *a quo* accepted the theory of relator's counsel, as set out in his petition, to the effect that the legislative grant of power to the Common Council of the City of New Orleans—Act 20 of 1882—to impeach, and to the Mayor to suspend a municipal officer, is unconstitutional and void, because it is a *judicial power* of removal, which, by the terms of Art. 201 of the Constitution, is confided *exclusively* to the Civil District Court, and, consequently, can not be exercised by any other department of the State government, "nor by any person or collection of persons holding office in them." Arts. 14 and 15 of Constitution of 1879. And it is equally evident that this supposed conflict between the City Charter and the Constitution arises from the fact that the power conferred on the Common Council and the Mayor is the *same* power that is conferred on the Civil District Court; otherwise, Arts. 14 and 15 of the Constitution would have no applicability to the question under consideration.

No other ground is assigned for the unconstitutionality of the City Charter, and no other can be considered. This supposition of counsel must be correct, otherwise the position assumed is illogical. And attention is attracted at this time to the position that is assumed by the relator in order to disembarrass the argument of any reference to the question of the constitutional authority of the Legislature to impart *political* power to the municipality of New Orleans.

But, is the legislative grant of the power of removal by impeachment which the City Charter confers upon the Common Council of the City of New Orleans, and the power of suspension conferred upon

the Mayor, in any sense a *judicial power*, incompatible with the power that is conferred by Art. 201 of the Constitution on the Civil District Court?

That question was, in effect, decided just the other way in State *ex rel.* Behan vs. Judge, 35 An. 1075. That was a case of prohibition issued by this court against one of the Judges of the Civil District Court, who had granted an injunction restraining and prohibiting the Common Council of the City of New Orleans from further proceeding with the impeachment of City Treasurer Walsh, and the Mayor from in any manner interfering with said Treasurer in the possession and administration of his said office.

"The preliminary writ of injunction," says the Court, "was granted at the instance and request of the Treasurer, and was predicated mainly on his allegations, and on the District Judge's opinion, *that the provisions of the City Charter which authorize the removal of City officials by impeachment by the City Council were in direct violation of the Constitution.*"

And in its analysis of the respondent judge's defence to the writ of prohibition the court said:

"The alleged unconstitutionality of the proceedings is (subject) to two subdivisions, viz.: (1) that in organizing a court of impeachment, the City Council was usurping judicial functions, in violation of Arts. 14 and 15 of the State Constitution; (2) that the provisions of the City Charter on the subject of impeachment were violative of the Constitution, Arts. 196 and 201, which had conferred (upon) the judiciary department the *sole* power of removing *municipal* officers."

And in considering and disposing of that defence, the court found the municipal corporation was controlled by a legislative charter, which had then been recently granted in pursuance of the authority delegated by the 254th article of the Constitution—this charter specifically recognizing the *inherent power of amotion* of municipal officers as existing in the corporation, and making additional provision for the exercise of that power by impeachment.

"We therefore hold," said the court, in summing up its opinion on the two propositions above stated, "both in reason and on abundant authority, that no court of justice had the legal power to interfere, by preliminary injunction, with the municipal council in the

exercise of that franchise, one of its plainest and most essential administrative functions," etc.

Entertaining this opinion, the court, of necessity, made the writ of prohibition peremptory, and the twofold effect of the judgment was, first, to maintain the perfect consonance of the impeachment proceedings of the Common Council, with removal proceedings contemplated under Art. 201 of the Constitution, because the former were legislative and the latter were judicial; second, because the power of amotion of municipal officers is *inherent* in all municipal corporations, entirely distinct from and independent of the power of removal provided for in the 201st article of the Constitution; which inherent power of amotion found expression in the City Charter in the shape of provisions looking to the impeachment of such municipal officers.

That decision clearly shows that the power of impeachment is not a *judicial* but a *legislative* function, and being a legislative function the power of impeachment did not come in conflict with Arts. 201, or 14 or 15 of the Constitution.

That decision proceeds on the theory that the act of the Legislature did not confer a power of removal *per se*—being examined and considered extrinsically—but recognized the existence of a power of amotion that is inherent in all municipal corporations, and apparently conferred upon the Common Council of New Orleans authority to exercise it by means of impeachment.

Yet the court did not pass upon the question of the constitutional right of the Legislature to provide that means of amotion, but distinctly left that question open for future settlement.

A careful examination and consideration of the principles announced in the Behan case clearly indicate that they must control the decision of the present case, because the issues are almost identical.

In that case the Common Council had inaugurated impeachment proceedings for the amotion of the City Treasurer for certain crimes and misdemeanors specified in the City Charter, and said treasurer resorted to an injunction in the Civil District Court for the purpose of arresting their further progress, and to prevent his suspension from office by the Mayor, pending the trial of the impeachment.

In this case the same council inaugurated like impeachment proceedings for the amotion of the relator as City Recorder for certain

causes assigned in the City Charter, and relator resorted to this suit in the Civil District Court for the purpose of ousting the respondent from the office to which he had been elected, and from which he had been suspended by the Mayor, pending the impeachment trial—relator contending that his suspension and respondent's appointment were illegal, because of the illegality of the impeachment proceedings resulting from the unconstitutionality of the City Charter in that particular.

The only possible difference that is discoverable between the two cases is in the fact that the impeachment proceedings have gone a little further in this case than they had in the Behan case—the *Mayor having actually suspended the relator and appointed the respondent in his stead* to act *ad interim.*

This being the exact situation of the case, was not the Civil District Court asked to do just what it was prohibited from doing in the Behan case—namely, restrain impeachment proceedings of the City Council? And does not this appeal invite this court to undo what that court has done, on the same ground and for like reason that it made Mayor Behan's writ of prohibition peremptory? Undoubtedly it does.

Realizing, doubtless, the difficulty of this situation, counsel for relator attempts, by argument, to break the conclusive force of the Behan case, by citing from the opinion that paragraph in which the court states that the view taken of that controversy obviated the "necessity of passing on the alleged unconstitutionality of the City Charter *on the subject of impeachment*"—the court holding that its conviction was clear to the effect that the District Court had wrongfully exceeded the bounds of its jurisdiction in enjoining the City Council in the *exercise of its power of amotion* of a municipal officer, albeit the process of amoting the officer was by statutory impeachment. But it seems clear that counsel entertain a proper conception of the distinction that was made by the court when they make, in their brief, the following statement:

"In the Behan case a judge of the Civil District Court had enjoined the City Council from prosecuting impeachment proceedings against Walshe. The Supreme Court issued a writ of prohibition against this exercise of jurisdiction by the District Court upon the old and well settled principle that a court will not interfere with the legislative or *quasi*-legislative proceedings of a municipal body, but

will restrict its interference to a protection of persons and property against unlawful interference with rights by any one claiming under color of a void municipal ordinance or resolution. This was the decision in the Behan case, and anything else was clearly *dictum*."

But, as is shown in this argument, this controversy is in the identical situation of the Behan case—Whitaker, recorder, and Walsh, treasurer, occupying identically the same plane as municipal officers, and equally without right of action in the Civil District Court to arrest the impeachment *proceedings pendente lite*.

And while the proposition announced by counsel for relator, that the jurisdiction of the Civil District Court will be recognized—and was in the Behan case recognized—to protect the rights of "persons and property against unlawful interference by any one claiming under a void municipal ordinance or resolution," may be accepted as correct as a general proposition, yet it does not go to the extent counsel claim it does. The theory of the court doubtless was that the rights of persons and property could be tested and determined by the *courts after* the impeachment proceedings were carried to the period of finality, and not while they were in motion; for, *non constat*, that the impeachment court would fail of convicting the municipal incumbent. But that, in the event of conviction, the removed official might then test before the courts of justice the constitutionality of the law which conferred the power to impeach; or, in other words, whether the terms and provisions of the Constitution were sufficiently broad and comprehensive to permit the General Assembly to confer on the municipal corporation the legislative power of impeachment as a means of amotion of municipal officer, and to entail as a consequence future deprivation of the right of the incumbent to hold municipal office.

But that is not the present situation of the Whitaker case. The impeachment court has not yet disposed of the questions before it, and having as yet arrived at no conclusion, and rendered no judgment, the stage at which the jurisdiction of the *courts* has its inception has not been reached.

My conclusion is that in so far as the question of the unconstitutionality of the City Charter, on the ground that it is an attempt to vest in the Common Council of the City of New Orleans and the Mayor a power of removal that, by the Constitution, is exclusively conferred on the Civil District Court of New Orleans, is concerned, it must

be answered in the negative; and that, in so far as the question of the constitutional power of the General Assembly to vest in the Common Council of the City of New Orleans the power of impeaching municipal officers, and entailing, as a consequence of conviction, deprivation of the right of the ousted official to thereafter hold municipal office, is concerned, no authoritative opinion can be *now* pronounced, because (1) it is not made an issue in this case; and (2) it can become a question for the *courts* only when the impeachment proceedings have been completed, and the rights of persons or property are properly put at issue thereunder, and said *proceedings and decree* are set up as the foundation of some right or claim, or same are relied upon as the muniment of some title to office.

For these reasons I concur in the opinion and decree reversing the judgment appealed.

CONCURRING OPINION.

MCENERY, J. The principle contended for by relator, that when the organic law provides for the removal of an officer it is exclusive of any other mode than that pointed out in the Constitution, admits of no controversy.

The Recorders' Courts in the City of New Orleans are part of the judicial system provided for that City by the Constitution. Const., Art. 136.

The recorder is a judicial officer, possessing generally the power and authority of a judge. 4 Dall. 299.

But the Recorder's Court is not a court of record within the meaning of Art. 196 of the Constitution. Therefore that article providing for impeachment of judges of courts of record can have no application to this case. The recorder is excluded from the rule of removal provided by said article and Art. 197 by Articles 201 and 93.

There are three modes provided by the Constitution for the removal of recorders of the City of New Orleans for high crimes and misdemeanors: (1) by suit before the Civil District Court, Parish of Orleans, in accordance with Art. 201; (2) by impeachment; (3) on address of two-thirds of the members elected to each house of the General Assembly. The last two modes are provided for by Art. 93 of the Constitution.

It is generally conceded that Art. 197 of the Constitution, vesting the sole power of impeachment in the House of Representatives,

applies only to the officers mentioned in Art. 196. Article 93 is as follows: "The judges of all courts shall be liable to impeachment for crimes and misdemeanors. For any reasonable cause the Governor shall remove any of them on the address of two-thirds of the members elected to each house of the General Assembly. In every case the cause or causes for which such removal may be required shall be stated at length in the address and inserted in the journal of each house."

There is a clear distinction between Arts. 196 and 93. If it had been intended that all judges should be impeached by the House of Representatives the Art. 196 would have said so, and Art. 93 would have been unnecessary. The impeachment mentioned in Art. 93 is not vested in the House of Representatives, and it was competent for the General Assembly to lodge it elsewhere. In all matters not prohibited by the Constitution the General Assembly is supreme.

If the Constitution had said that the City Council could impeach the recorder for high crimes and misdemeanors there would be an end of the controversy. The Constitution not having forbidden the delegation of this power either directly or by implication, the General Assembly in the exercise of its supreme authority could vest it in the City Council of New Orleans. That Article 93 contemplated in the case of recorders a delegation of this power to the City of New Orleans is very plain from the text of Art. 198. It is significant that in this article, instead of using the word Governor or executive the words "appointing power" are employed.

The article says: "All officers against whom articles of impeachment may be preferred shall be suspended from the exercise of the functions of their office during the pendency of such impeachment, and except in case of the impeachment of the Governor the appointing power shall make a provisional appointment to replace any suspended officer until the decision of the impeachment."

That this article applies also to another "appointing power" than the Governor or executive who issues commissions for original vacancies or to elected officers is very clear because of the omission of the words Governor or executive, and the delegation by Art. 253 of the Constitution to the citizens of New Orleans of the right of appointing the several public officers necessary for the administration of the police of said City. The recorder is a necessary officer for such purposes, and the Art. 93 seems specially to have been

framed for the purpose of allowing the City Council, by permission of the General Assembly, to impeach for high crimes and misdemeanors the recorders of the City of New Orleans. State *ex rel.* Behan vs. Judge, 35 An. 1075.

In my opinion any offence embraced in the description of Art. 196 of the Constitution, which is not a crime or misdemeanor, must be, for the removal of the recorders, prosecuted according to Art. 201.

I concur in the decree.

DISSENTING OPINION.

MILLER, J. My examination has brought me to a conclusion different from that reached by the majority of the court in this case.

The question is whether the relator, the Recorder of the First Recorder's Court of the City of New Orleans, to which he was duly elected under the law creating it, can be removed by the order of the Mayor of the City, and under color of impeachment proceedings of the City Council. The Constitution of the State, under the rubric "Impeachment and removals from office," provides that district attorneys, clerks of court, sheriffs, coroners, recorders, justices of the peace, and all other parish, municipal and ward officers, shall be removed by judgment of the District Court of the domicile of such officer, specifies the mode of procedure and court, and designates the Civil District Court of the Parish of Orleans as the tribunal for all removal proceedings against officials filling offices in this Parish. Other articles under the same rubric deal with the impeachment and removal from office of the Governor and other constitutional officers of the executive department. The removal of the judges is provided for in another article, and there is found the provisions for the removal of recorders. (Const., Arts. 196 *et seq.*, 201.) The article expressly mentions his office; and to make the scope of the provision more emphatic, declares that all other parish, municipal and ward officers are intended to be embraced. The Constitution uses the term "impeachment" only with reference to the Governor and other heads of the executive department. In dealing with the judges and municipal officers the words "shall be removed" are used. While impeachment has a larger significance than removal, it certainly includes removal from office. The Constitution specifies the causes for impeachment and

removals, and embracing every conceivable cause, thus: High crimes and misdemeanors, non-feasance or malfeasance in office, incompetency, corruption, favoritism, extortion or oppression in office, gross misconduct or habitual drunkenness. With this enumeration of causes, and of *all* the executive, judicial, parish, ward and municipal offices, the Constitution confides the impeachment and removal power to the Senate and House in respect to the Governor and chief executive officers, and to the courts is entrusted the removal of the judicial and parish and municipal officers. It seems to me the Constitution manifests plainly that the whole power of impeachment and removal from office was to be exerted solely by the instrumentality specified in the Constitution. There is plainly exhibited the appreciation that the power was judicial in its nature. Following the precedent of the Constitution of the United States, it clothed the House of Representatives with the function of preferring articles of impeachment of the higher State officers, and their trial is to be by the Senate, vested for that purpose with judicial powers, the highest judicial officer of the State, the Chief Justice, presiding. In respect to judicial and other officers, including recorders and *all* municipal officers, the courts are designated to exert the power of removal. It is, in my opinion, useless to discuss whether the power of removal of officers like recorders, on general principles, pertains at all to the City Council. All will recognize that it was for the framers of the Constitution to determine whether the grave power of removal from office, carrying with it the stain on character necessarily implied, should be vested in a body like the City Council, or reposed in that department of the government better qualified, from its structure and modes of proceeding, to deal with such questions. In my view, the Constitution expresses in the clearest language that the power of removal is not in the City Council, but in the courts. The opinion of the majority of this court affirms that notwithstanding the constitutional provisions on this subject, the power to remove the incumbent of the office of recorder, created by legislative act, is in the City Council. Const., Arts. 196, 201; Act No. 20 of 1882, Secs. 30, 58 *et seq.*

I can not appreciate the argument that there can be an impeachment or removal power in the courts by virtue of the Constitution, and the same power, whether called impeachment or removal, and for precisely the same causes as are prescribed by the Constitution,

vested in the City Council. I see no purpose in the Constitution to leave that power to be exerted by the courts or by the council. No such view, it is reasonable to suppose, ever occurred to the framers of the Constitution. When the organic law confided the power to the courts, in any reasonable construction it must be deemed to have intended the exclusion of any other instrumentality. Nor can I see the force of the argument that, because the recorders as now constituted are named in the City Charter of 1882, that therefore the Constitution framed in 1879 has no application to recorders. The Constitution announced a policy for the future as well as the present. It refers specifically to recorders known to the law since 1805 as exerting judicial functions in this city. The constitutional provisions in Art. 201 applied to the office of recorder as then existing, and to the same office thereafter modified or created by subsequent legislation. As soon as the act of 1882 was passed the Constitution applied itself to the office of recorder named in that act, and fixed for all time as long as the Constitution should endure the power of removal in the courts. No refinement of language nor of meaning can take recorders out of the scope of Art. 201. If the mode of removing recorders is not prescribed by that article, with equal reason it might be said sheriffs or coroners are not embraced. Recorders, sheriffs and coroners are named and *ex industria*, "all municipal and parish officers," is added. The contention then admits consistently of no support that the Constitution does not provide for the removal of recorders. Is it now to be maintained that consistently with the constitutional provisions the Legislature could by the Act of 1882 provide another method of removal? Least of all, can I understand that the decision in the Behan case (35 An. 1075) controls the question here. It is familiar that courts never enjoin legislative bodies. The Behan case was an injunction to restrain the council from continuing pending impeachment proceedings against the City Treasurer. The issue was simply and only whether such injunction could issue. That determination disposed of the controversy. All the reasoning of the court was limited in legal effect to the point presented. The impeachment was never consummated. How then can it be affirmed that the court in that case determined the grave question here presented whether the impeachment is not exclusive in the courts? While the court in that case used language tending to affirm an impeachment power in the council, the reason-

ing can not by any canon of construction be accepted as a decision of the issue here. Indeed, the view of the court in the Behan case seems to be announced thus:

"We are therefore clear in our conviction that in this case the District Court has wrongfully exceeded the bounds of its jurisdiction, and that the proper and only efficient check is by the writ of prohibition. This view of the controversy obviates the necessity of passing on the alleged unconstitutionality of the City Charter on the subject of impeachment, which will be disposed of whenever it comes up in a proper proceeding."

This is no case of an injunction to stay proceedings of the council. Right or wrong the council proceeds. But the case calls on this court to determine whether the relator can be deprived of his office and emoluments by virtue of the council proceedings. While courts never interfere with the proceedings of legislative bodies, it is the undoubted judicial function to determine the effect of such proceedings when they affect the rights of parties, and to protect such rights. That is the function this court is called to exercise. In its exercise the court must decide whether the removal power exists in any department but the courts, and in my opinion the question admits only of one answer, which finds apt expression in this language of the late Chief Justice:

"It is an axiomatic proposition that a Legislature is powerless to act where the Constitution has spoken and has left no room for its action. Hence, when a Constitution has provided for the qualification of certain officers, for their removal for certain causes, by certain authorities, and in a certain way, a Legislature is incompetent to prescribe, as to those same officers, for different qualifications, different causes of removal, different authorities or different ways. It can neither add nor take from the constitutional provisions on those subjects, which must remain untouched and enforced as written."

I think, too, that the previous adjudications of this court support the exclusiveness of the methods of removal prescribed by the Constitution. 34 An. 273; 35 An. 993.

In my opinion the relator is entitled to the relief he seeks.